Supreme Court, U.S.
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APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5037

DON RICHARD LEGO,

Petitioner,

—v.—

JOHN TWOMEY, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 20, 1970
WRIT OF CERTIORARI GRANTED MARCH 29, 1971

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5037

DON RICHARD LEGO,

Petitioner,

—v.—

JOHN TWOMEY, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PLACITA, JANUARY 13, 1970 SESSION

DATE	LIST OF DOCUMENTS
4- 8-69	Leave granted to petitioner to file in forma pauperis CAMPBELL, J.
4- 8-69	Filed petition for writ of habeas corpus; and letter from Petitioner to Judge Will dated April 5, 1969 (JS-5)
4- 8-69	Filed designation JWH
4-15-69	Filed Memorandum Opinion.
4-15-69	Pursuant to Court's Memorandum Opinion this day filed order petition for a writ of habeas corpus dismissed. Petitioner has failed to demonstrate that the Illinois Courts have had an opportunity to consider and decide the questions presented in his aplication for a writ of habeas corpus.—Will, J. (JS-6) Y
4-28-69	Filed Petitioner's letter 4/24/69 addressed to Judge Will and a petition for rehearing attached thereto. Y
5-23-69	Filed Petitioner's letter, dated 5/19/69 and addressed to Judge Will. Y
8-13-69	Filed petitioners document titled "Argument in support of petition for habeas corpus and rehearing," and copy. K
10- 2-69	Petitioner's petition for rehearing granted. Order heretofore entered denying petition for a Writ of Habeas Corpus vacated and set aside. Order respondent to show cause on October 16, 1969 at 10 A.M. why a writ of habeas corpus should not issue. —Will, J (JS-5) Y
10- 7-69	Filed petitioner's letter 10-3-69 addressed to Judge Will and a carbon copy of petition for Writ of Habeas Corpus in the Supreme Court of the State of Illinois. Y

List of Documents

DATE	LIST OF DOCUMENTS	
10-16-69	Order cause continued to October 17, 1969 at 10 A.M. for respondent to show cause why a writ of habeas corpus should not issued. Will, J	Y
10-17-69	Filed Respondent's notice of motion and motion to dismiss petition for writ of habeas corpus attached.	
10-17-69	Order leave respondent to file instanter motion to dismiss petition for writ of habeas corpus. Order cause taken under advisement. Will, J	Y
11-13-69	Filed Respondent's return to the Rule to Show Cause with certified record from Criminal Court of Cook County attached.	Y
11-21-69	Filed Petitioner's traverse to the respondent's Return to the Rule to show cause.	Y
1-13-70	Filed Memorandum Opinion.	
1-13-70	Pursuant to Court's Memorandum Opinion this day filed order petition for a writ of habeas corpus denied.—Will, J. (JS-6)	Y
1-21-70	Filed Petitioner's Notice of Appeal and Petition for Certificate of probable cause in forma pauperis.	
2-10-70	Filed in re Certificate of Probable Cause for Appeal and Petition to Proceed in Forma Pauperis.	
2-10-70	Filed Certificate of Probable Cause.	
2-10-70	Pursuant to Court's statement this day filed order petitioner's petition for a Certificate of Probable cause and leave to proceed in forma pauperis granted. Order leave to petitioner to proceed in forma pauperis. Order leave to petitioner to file Notice of appeal in forma pauperis and Clerk is directed to prepare and transmit record on appeal to the United States Court of Appeals, Seventh Circuit, without payment of costs.—Will, J.	Y

69 C 754

PLACITA, JANUARY 13, 1970 SESSION

April 5, 1969

69 C 754

[Filed Apr. 8, 1969, Elbert A. Wagner, Jr., Clerk]

Re: U. S. ex. rel. Don Lego vs.
Frank J. Pate, Warden.
Habeas Corpus Proceedings

Honorable Hubert L. Will
United States District Judge
U. S. Court House
Chicago, Illinois

Dear Judge Will:

Submitted herewith for your consideration is my petition for writ of habeas corpus. In my petition I present one issue for determination: Whether I was afforded an adequate and correct fact finding process upon the issue that a confession used at my trial was constitutionally inadmissible as evidence.

Under the *Jackson-Denno* dictates, 372 U.S. 368, 382, 84 S. Ct. 1774, 1785 (1964), the Supreme Court held that a "defendant objecting to the admission of a confession is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined," and that the New York procedure did not afford a reliable determination of the voluntariness of the confession.

* * * *

This issue was presented to the trial court in both post conviction proceedings and habeas corpus proceedings; the trial court denied relief without a proper hearing on the merits. The Supreme Court of Illinois having heard an appeal (32 Ill. 2d. 76) from the judgment of the trial court and the matters herein not having been

raised in the original appeal, the petitioner has no appeal remedy to bring these matters before the Supreme Court of the State of Illinois.

It is, then, the prayer of the petitioner herein, Don R. Lego, that this court accord a proper hearing upon the issues of the petition and appoint counsel from the Federal Defenders office to represent his case herein.

Respectfully

/s/ Don R. Lego
DON R. LEGO #48138

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Habeas Corpus No. ———

UNITED STATES OF AMERICA, EX REL. DON RICHARD LEGO,
PETITIONER-APPELLANT

vs.

FRANK J. PATE, Warden etc., RESPONDENT-APPELLEE
On Petition for Writ of Habeas Corpus to the

United States District Court for the Northern
District of Illinois, Eastern Division

HONORABLE HUBERT L. WILL, Judge Presiding

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

This cause comes before the court to be heard upon the petition of, *Don R. Lego*, for the issuance of a Federal Habeas Corpus Writ and for leave to be allowed to proceed in this court with the appointment of counsel assigned by this court from the Federal Defenders office.

JURISDICTIONAL STATEMENT

This court has jurisdiction to adjudicate the instant petition for writ of habeas corpus pursuant to the provisions of 28 U.S.C. 2241-2243.

EXHAUSTION OF STATE REMEDIES

The petitioner herein has exhausted every available state remedy before coming to this court with respect to the contentions of the instant petition for writ of habeas corpus. The Illinois Supreme Court affirmed the judgment of the trial court in People vs. Lego, 32 Ill. 2d 76; likewise the Circuit Court of Cook County has heretofore denied both post conviction and habeas corpus relief pursuant to Illinois Revised Statues, Chapter 38, and Chapter 65 respectively.

PRIOR FEDERAL HABEAS CORPUS PROCEEDINGS

The Federal District Court, Will, J, denied the petitioner habeas corpus relief in this court in prior petitions filed herein; however, the contention raised in the instant petition deals with issues not heretofore presented to this court in any prior proceedings herein. It is perhaps, noteworthy, to suggest to the court that in all the prior proceedings heard in this court, the petitioner has been denied the assistance of counsel to represent his proceedings herein.

STATEMENT OF JUDGMENT

The habeas applicant, *Don R. Lego*, was arrested in Alsip, Illinois on the first day of January, 1961 and charged with the offense of robbery etc. The arresting officers immediately took the petitioner to the police station and subjected him to police interrogation. At the conclusion of approximately (4) hours of interrogation, the petitioner was asked to sign a confession reduced to writing.

The petitioner refused to sign the confession and requested that he be allowed to call an attorney; the confession concludes in its substance: "no, I refuse to sign this statement. I want to see a Doctor and attorney".

Thereafter the petitioner was indicted by the Cook County Grand Jury and the case came on for a jury trial before the Honorable Leslie Salter; that, prior to the trial on the merits, defense counsel moved that the confession be suppressed for reason that such confession had been attained from the petitioner in violation of his constitutional rights.

At the conclusion of the hearing on the motion to suppress, the trial court denied the motion and the confession was thereafter read to the jury. The jury returned a verdict of guilty and the petitioner was, thereafter sentenced to the Illinois state penitentiary.

This court (the federal district court) after examining the state court record of proceedings concluded: (1) that the confession itself concludes with the defend-

ants request to be allowed to call an attorney; (2) that the confession was not signed by the defendant; (3) that nothing in the records alludes to the effect that the defendant was admonished as to his constitutional rights by the interrogating officers.

After making such conclusions of law and finding of facts, this court denied the prior petitions filed herein (see the decisions of the district court filed in this case.

INTERVENING CASE LAW

The Supreme Court of the United States in Jackson vs. Denno, 378 U.S. 368, 377, 84 Sup. Ct. 1774, 1781 (1964) promulgated a set of rules for the States to follow in having the voluntary character of a confession determined. It is with respect to that case and its required procedures for the determining of whether a confession is admissible as evidence that the petitioner brings the instant petition to this Court.

* * * *

CONCLUSION

Under Townsend vs. Sain, 372 U. S. at 212-213, this court may decide the instant petition for writ of habeas corpus making finding of facts and conclusions of law applying correct constitutional standards.

Respectfully submitted,

/s/ Don R. Lego
Petitioner
Box 112, Joliet, Illinois

Subscribed and sworn to before me this 4 day of April, 1969.

/s/ Elwin J. Meyer
Notary Public

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

69 C 754

[Filed Apr. 15, 1969, Elbert A. Wagner, Jr., Clerk]

UNITED STATES OF AMERICA EX REL.
DON RICHARD LEGO, #48138, PETITIONER

v.

FRANK J. PATE, Warden, RESPONDENT

MEMORANDUM OPINION

Petitioner is presently serving a sentence of twenty-five to fifty years in the Illinois State Penitentiary at Joliet, Illinois. This sentence was imposed by the Circuit Court of Cook County on February 24, 1961, following the petitioner's conviction by a jury of the criminal offense of Armed Robbery. This conviction was subsequently affirmed by the Supreme Court of Illinois. *People* v. *Lego*, 32 Ill.2d 76, 203 N.E.2d 875 (1965).

The instant petition for a writ of habeas corpus alleges that the procedure employed by the trial court to determine the admissability of a confession introduced against him was unconstitutional. Prior to the trial on the merits the petitioner made a motion to suppress an oral confession which had been reduced to writing, contending that the confession was given as a result of coercion by the police. After a separate hearing on this issue, the court denied the motion and the confession was subsequently received into evidence during petitioner's trial. Petitioner asserts that this procedure was unconstitutional because the trial court was not required to find the voluntariness of the confession to be beyond a reasonable doubt before its admission into evidence. Further, he asserts that the procedure employed by the trial court did not afford him a fair hearing on the issue since he did not have the right to attack the voluntary character of the confession before the jury.

This Court does not reach the merits of these contentions. Federal habeas corpus is designed to provide a remedy for those who have been subjected to state prosecution in violation of their federal rights. However, section 2254 of Title 28 of the United States Code limits the issuance of the writ to those instances in which the petitioner has exhausted his state remedies or clearly demonstrated the unavailability of state corrective processes.

This provision has been construed to require that a petitioner fulfill at least two general conditions before requesting a writ of habeas corpus in a federal court. First, he must have sought relief in each court of the State court hierarchy in which a remedy is available. *See, e.g., Barry* v. *Sigler*, 373 F.2d 835, 838 n. 3 (8th Cir. 1967); *Morehead* v. *State of California*, 339 F.2d 170, 171 (9th Cir. 1964); *Thompson* v. *Peyton*, 280 F. Supp. 210 (W.D. Va. 1968); *United States ex rel. Lyle* v. *Carney*, 277 F. Supp. 250 (W.D. Pa. 1967). Second, it must be shown by the petitioner that exactly the same points urged in the federal court were previously raised in these State courts. *See, e.g., United States ex rel. Waldron* v. *Pate*, 380 F.2d 94 (7th Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); Rose v. Dickson, 327 F. 2d 27 (9th Cir. 1964); *United States ex rel. McDonald* v. *Deegan*, 284 F. Supp. 166, 167 (S.D.N.Y. 1968); *Application of Ortega*, 158 F. Supp. 946, 948 (N.D. Ill. 1957), *cert. denied*, 359 U.S. 928 (1959). If either of these conditions is unfulfilled, the application for a writ of habeas corpus must be denied.

At the present time, it appears that petitioner has not satisfied these conditions. Although the petitioner raised the admissibility of his confession in his appeal to the Supreme Court of Illinois, an examination of the Court's opinion does not reveal any consideration of the questions which he raises in the instant petition. Apparently, the sole ground on which the petitioner challenged the admissibility of the confession in the state court proceedings was that the prosecution had failed to call all the witnesses to the confession or to satisfactorily account for their absence. *People* v. *Lego*, 32 Ill.2d 76,

79-80, 203 N.E.2d 875, 878 (1965). While the opinion of the Court reveals that it found the trial court's ruling "was not against the manifest weight of the evidence," nothing therein indicates that the constitutionality of this standard was ever in dispute. Similarly, the opinion does not suggest that the petitioner asserted any right to challenge the voluntary character of the confession before the jury.

This Court cannot assume that the Illinois Supreme Court had an opportunity to explore and determine these questions on petitioner's appeal. Indeed, the burden is on the petitioner to show that the questions which he seeks to raise in this proceeding were also raised in the state courts. *See United States ex rel. Sproch* v. *Regan*, 246 F.2d 264, 266-67 (7th Cir. 1957).

Since the petitioner has failed to demonstrate that the Illinois courts have had an opportunity to consider and decide the questions presented in his application for a writ of habeas corpus, the application must be dismissed. An appropriate order will enter.

/s/ Hubert L. Will
United States District Judge

Dated: April 15, 1969

April 24, 1969

[Filed Apr. 28, 1969, Elbert A. Wagner, Jr., Clerk]

Re: U.S.A. ex rel. Don Lego vs.
Frank J. Pate, Warden
Habeas Corpus No. 69c754

Honorable Hubert L. Will
United States District Judge
U. S. Court House
Chicago, Illinois

Dear Judge Will:

I am submitting attached hereto my petition for a rehearing with respect to your order of April 15, 1969, denying my petition for a writ of Habeas Corpus. In your order denying the petition you stress that such petition should be denied unless it is clearly demonstrated that there is an "unavailability of state corrective processes."

In my petition for rehearing I point out the fact that the identical issues as is raised in my petition for writ of habeas corpus was, in the first instance, presented to the Circuit Court of Cook County in both state habeas corpus and post conviction proceedings; also, that the trial court denied relief in those proceedings holding that both the old issues and the new issues of the petitions were res judicata because of the fact that the state Supreme Court had affirmed my conviction on direct appeal (People vs. Lego, 32 Ill. 2d 76)

Since I have presented the identical issues in the Circuit Court of Cook County under the aforementioned remedies, I have no further remedies in the lower trial court. Likewise, since the new issues raised were not developed at the time of my direct appeal to the Supreme Court, that court could not pass upon the "new issues" in the direct appeal.

Since I am allowed only one appeal from the judgment of the trial court to the Supreme Court of Illinois; and since I have used that appeal right prior to the developing of the new issues, I cannot now obtain another appeal to the Appellate courts of Illinois and have the new issues resolved there.

It is Apparent, therefore, that I have used my available state remedies with regard to the new issues concerning whether the fact finding process for the determining of confessions in Illinois violates due process standards. For these reasons I respectfully submit my petition for reconsideration of your order of April 15, 1969, and respectfully pray thereby that a rehearing be accorded and at which time the habeas application will be decided on the merits.

Respectfully submitted,

/s/ Don Richard Lego
DON RICHARD LEGO #48138
Box 112, Joliet, Illinois

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

69 C 754

[Filed Jan. 13, 1970, Elbert A. Wagner, Jr., Clerk]

UNITED STATES OF AMERICA, EX REL. DON RICHARD LEGO, PETITIONER

v.

FRANK J. PATE, Warden, RESPONDENT

MEMORANDUM OPINION

Petitioner is presently incarcerated in the Illinois State Penitentiary, Stateville Branch, pursuant to his conviction by the Criminal Court of Cook County for the offense of Armed Robbery. Petitioner was tried before a jury and found guilty on February 24, 1961. He was sentenced by the court to a term of not less than 25 or more than 50 years. Following his conviction, petitioner appealed directly to the Illinois Supreme Court. That Court affirmed the judgment of the trial court. *People* v. *Lego*, 32 Ill.2d 76 (1965). Petitioner has also sought post-conviction relief via both post-conviction and habeas corpus (federal and state) petitions.[1] Petitioner has heretofore sought habeas corpus relief in this Court. We denied petitioner's latest petition on April 15, 1969, and he comes now upon a petition for rehearing, asking us to reconsider our order of April 15.

Petitioner reiterates that the identical issues raised in his earlier petition were presented to the Cook County Circuit Court. He further states that his post-conviction petition and state habeas corpus petition were denied on the ground that consideration of both the old and the

[1] Post-conviction petition #1167, on July 20, 1961, before Judge Salter, Denied; Post-conviction #1417, on February 16, 1967, before Judge Power, Denied; and State Habeas Corpus petition #45391, on August 14, 1968, before Judge Fitzgerald, Denied.

new issues was precluded by the doctrine of *res judicata* because of the Illinois Supreme Court's affirmance of petitioner's conviction on direct appeal. *People* v. *Lego*, *supra*. Petitioner submits that he has exhausted his presently available state court remedies as required by 28 U.S.C. 2254.

Upon reconsideration, we agree with petitioner. We do so for two reasons. First, at the time the April opinion was filed we were of the opinion that, since petitioner raised only the question of the admissibility of his confession in his appeal to the Supreme Court of Illinois and not the issue raised here, he had not exhausted. We adopted this position because it was assumed at that time that petitioner could avail himself of Ill. Rev. Stats., ch. 38, section 122-7, and could seek review of the new issues by having the Illinois Supreme Court review the dismissal of the recent post-conviction hearing petition. After a more thorough examination of section 122-7 we realize that, although the section permits a review of any final judgment entered upon a petition for a post-conviction hearing, such review must proceed "as an appeal in civil cases," because a post-conviction hearing proceeding is civil in nature. Therefore, petitioner must file a notice of appeal within 30 days. (S.H. Ill. Ann. Stats., Ch. 110A sec. 303(a)). This section allows an appeal only within its 30 day time limitation. It does not permit, as did an earlier section, an appeal within one year by order of the reviewing court entered within 14 months from the entry of the order, decree, judgment or other determination. Because petitioner did not prosecute a notice of appeal within the prescribed time, he no longer has available this state court remedy.

Second, because a petition for a State writ of habeas corpus may be filed either originally in the Supreme Court or in the Circuit Court, a denial of a habeas corpus petition by a state Circuit Court in Illinois is not reviewable by the Illinois Supreme Court. *White* v. *Ragen*, 324 U.S. 760 (1945), rehearing denied 326 U.S. 807. This rationale corroborates the enunciated intent of the Illinois post-conviction hearing remedy. This

remedy is intended to be the complete post-conviction remedy for persons convicted of crimes and who claim that the proceedings contained constitutional violations. *People* v. *Gragg*, 16 Ill.2d 336, 157 N.E.2d 57, 1959. Thus, petitioner is presently without any available state remedy as he cannot appeal from either the Circuit Court's denial of his State habeas corpus petition or from the denial of his post-conviction hearing petition. Because petitioner is without any state court remedy we must consider the merits of his contentions.

Petitioner alleges that the Illinois evidentiary procedure for determining the voluntariness of extra-judicial confessions is so unreliable as to contravene his Fourteenth Amendment right to due process. Specifically, petitioner contends that, since the trial judge in the preliminary determination of voluntariness outside the presence of the jury is not required to find beyond a reasonable doubt that the confession was voluntary, the procedure is unconstitutional. He further avers that since he did not have the right to attack the voluntary character of the admitted confession before the jury, he was denied due process of law. The latter contention is unfounded and we need not discuss it more fully than to say that it is without merit because petitioner took the stand in his own defense and introduced the same evidence to attack the credibility of his confession that he used in the preliminary hearing to attack its voluntariness. (See record pp. 223-226). In addition, the jury was given the usual beyond a reasonable doubt instruction.

Respondent argues that the Illinois procedure which determined the voluntariness of petitioner's extra-judicial confession is not unreliable and therefore did not deny him Fourteenth Amendment due process. Petitioner's argument is predicated upon the fact that the state of Illinois does not require the trial judge to find voluntariness beyond a reasonable doubt. Petitioner's argument is interesting but incorrect, for a sufficiency test cannot be applied to questions of admissibility.

Illinois traditionally has required the trial court to pass on evidentiary questions and, as a consequence, a confession can become competent evidence only when it

is voluntary. *People* v. *Miller*, 13 Ill.2d 78, 91 (1958); *People* v. *Thomlinson*, 400 Ill. 555 (1948). Moreover, a confession becomes admissible only after its voluntariness has been determined by the trial judge at a hearing outside the presence of the jury. *See, e.g., People* v. *Miller, supra*, at 95; *People* v. *Fox*, 319 Ill. 606 (1926); *People* v. *Guido*, 321 Ill. 397 (1926); *People* v. *Lindsay*, 412 Ill. 472 (1952); *People* v. *Sloss*, 412 Ill. 61 (1952); *People* v. *Hall*, 413 Ill. 615 (1933).

In *Jackson* v. *Denno, supra*, at pp. 382-3, 386, 388, 392 and 395, the Supreme Court recognized that the issue of voluntariness was evidentiary and its admissibility was for the court, stating, ". . . it is only a reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant and which would permit the jury to consider the confession in adjudicating guilt or innocence." (p. 387) Since confessions are evidentiary, requiring that a reasonable doubt standard be applied by the court would be an exception to and a departure from the court's normal role in the process of admitting evidence.

Notwithstanding that it is an exception to the normal evidentiary standard of relevance, some courts have required a "beyond a reasonable doubt" standard to be applied in determining questions of voluntariness.[2] These jurisdictions in insisting upon the higher standard confuse the admissibility of evidence with the sufficiency of proof. Such confusion is unfortunate for it effectively

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[2] Minority, *e.g.*,—*Mullens* v. *United States*, 382 F.2d 258 (4th Cir. 1967); reaffirming *United States* v. *Inman*, 352 F.2d 954 (4th Cir. 1965); *Pea* v. *United States*, 397 F.2d 627 (D.C. Cir. 1968); *Fernandez* v. *Beto*, 281 F.Supp. 207 (N.D. Tex. 1968); *State* v. *Ragsdale*, 249 La. 420 (1966), cert. den. 385 U.S. 1029 (1967); *State* v. *Keiser*, 274 Minn. 265 (1966); *Lee* v. *State*, 236 Miss. 716 (1959); *State* v. *Longmore*, 178 Neb. 509 (1965); *State* v. *Yough*, 49 N.J. 587 (1967); *People* v. *Huntley*, 15 N.Y.2d 72 (1965); *State ex rel. Goodchild* v. *Burke*, 27 Wis.2d 244 (1965), cert. den. 384 U.S. 1017 (1966); *State* v. *Thundershield* (S.D. 160 N.W.2d 408 (1968); *Commonwealth* v. *Mayhew*, 297 Ky. 172 (1943); *People* v. *Stroud*, 78 Cal. Rptr. 270 (1969); *State* v. *Davis*, 438 P.2d 185 (Wash. 1968).

clouds the real issue, i.e., whether the particular piece of evidence meets the requisites of admissibility.

The admissibility of any evidence should not and does not bear any relationship to the ultimate question of the sufficiency of the proof. Instead, the real concern should be whether the proffered evidence is relevant and probative. It is, of course, legend that a confession is relevant and material, but the voluntariness issue contains no special circumstances requiring specialized standards. What has troubled courts in the past is the difficulty of ascertaining the reliability of the jury's determination of voluntariness. To alleviate this uncertainty and possible taint, the independent hearing procedure was established. Thus, our focus must rest upon a consideration of the procedure used in determining whether or not a confession can be admitted.

Because the defendant can introduce during the trial the same evidence that he introduced at the hearing to challenge the confession's voluntariness, no prejudice can result; and even though a confession may be a key item in proving a defendant's guilt, that fact alone without more cannot elevate the standard of its admissibility to a constitutional level. Additional factors which might invoke the use of such a standard, such as prejudice, ineffective procedures or prosecutorial bias, do not exist. Voluntariness is the sole question. In the instant case, a preliminary hearing, outside the presence of the jury, was held and the trial court upon a presentation of the facts surrounding the confession, denied defendant's motion to suppress and admitted the confession. The judge's denial necessarily indicated that he found the confession to be voluntary. Our examination of the trial record indicates that the petitioner received a full and fair hearing and a determination of the confession's voluntariness absent any consideration of its veracity. In so doing, the trial court applied the constitutional requisites of *Jackson* v. *Denno*, *supra*.

Since we understand voluntariness to be synonomous with admissibility, no other standard is required than that which is normally used to determine the admissibility of evidence. We hold, therefore, that the trial judge

is not required to utilize the "beyond a reasonable doubt" standard when he ascertains voluntariness. Petitioner's test can and should only apply to the total effect of the evidence, i.e., as to the guilt or innocence of the defendant. It is important, too, to understand that the constitutional guarantee of *Jackson* v. *Denno* is solely a procedural assurance that the admissibility of a confession will be determined in a full and fair proceeding outside the presence of the jury. This proceeding guarantees to the petitioner at least one forum where the voluntariness issue can be evaluated without any regard to its truth. Thus, Jackson does not purport in any way to change, alter or amend the relevancy test for admissible evidence.

Because the hearing procedure in no way alters the traditional test and because we find no compelling constitutional or practical reason to establish new standards for determining whether or not something may be introduced into evidence, we must deny petitioner's petition for a writ of habeas corpus. An appropriate order will enter.

/s/ Hubert L. Will
United States District Judge

Dated: January 13, 1970

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

69 C 754

[Filed Feb. 10, 1970, Elbert A. Wagner, Jr., Clerk]

UNITED STATES OF AMERICA EX REL. DON R. LEGO, PETITIONER

v.

FRANK J. PATE, Warden, RESPONDENT

IN RE CERTIFICATE OF PROBABLE CAUSE FOR APPEAL AND PETITION TO PROCEED IN FORMA PAUPERIS

Petitioner, Don R. Lego, seeks to appeal the order entered by this Court on January 13, 1970, denying his petition for habeas corpus relief.

This Court dismissed his petition because petitioner's contention, i.e., that the trial judge in his preliminary determination of the voluntariness of the confession need not find voluntariness beyond a reasonable doubt, was without merit. Petitioner again asserts the same argument and he interprets one of the sentences of this Court's January 13, 1970 opinion to be a recognition by this Court that other district courts do in fact employ such a standard. He submits, therefore, that this Court should issue a certificate of probable cause allowing the petitioner an appeal to have resolved what he calls "an apparent conflict."

Petitioner, while relying on language from our opinion, fails to correctly interpret the context of that statement. The statement, "Notwithstanding that it is an exception to the normal evidentiary standard of relevance, some courts have required a beyond a reasonable doubt standard to be applied in determining questions of voluntariness . . ." was offered to illustrate the confusion which the other circuits have created by failing to carefully delineate the differences which do exist between the

standard applied when determining a question of the admissibility of a piece of evidence and when determining the standard that should be applied when evaluating the weight of all the evidence.

While we are of the opinion that our decision of January 13, 1970 deals carefully and thoroughly with petitioner's contention, a determination of the question by the Court of Appeals would be helpful. Therefore, petitioner's petition for a certificate of probable cause and leave to proceed in forma pauperis is granted. An appropriate order will enter.

/s/ Hubert L. Will
United States District Judge

Dated: February 10, 1970

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

October 8, 1970

BEFORE HON. LUTHER M. SWYGERT, *Chief Judge*
HON. JOHN S. HASTINGS, *Senior Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*

No. 18313

UNITED STATES OF AMERICA, EX REL. DON RICHARD LEGO,
PETITIONER-APPELLANT

vs.

FRANK J. PATE, Warden, RESPONDENT-APPELLEE

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

ORDER

Petitioner-appellant Don Richard Lego is presently confined in an Illinois penal institution pursuant to a judgment of conviction by an Illinois state court finding him guilty of a charge of armed robbery. On appeal, the judgment of conviction was affirmed by the Illinois Supreme Court. People v. Lego, 32 Ill. 2d 76, 203 N.E. 2d 875 (1965). Two state post-conviction petitions for relief were denied, as were state and federal habeas corpus petitions. The federal habeas petition was denied by the District Court for the Northern District of Illinois, Honorable Hubert L. Will presiding, on April 15, 1969. Subsequently, Judge Will granted a petition for rehearing and after full and complete consideration entered an order denying petitioner's petition for a writ of habeas corpus. Judge Will's able memorandum opinion fully sets forth the issue before us on appeal and is

reported as United States ex rel. Lego v. Pate, N.D. Illinois E.D., 308 F. Supp. 38 (1970). The issue here is whether the Illinois trial court, in determining the voluntariness of petitioner's extra-judicial confession, used an evidentiary procedure so unreliable as to contravene petitioner's Fourteenth Amendment right to due process. The district court held in the negative. We affirm.

Petitioner appears in this appeal *pro se*. We ordered the case submitted on the record and briefs, without oral argument. On the authority of Judge Will's reported memorandum opinion, *supra*, which we approve and adopt, the judgment below denying petitioner's petition for a writ of habeas corpus is now affirmed. It is so ordered.

AFFIRMED.

IN THE CRIMINAL COURT OF COOK COUNTY

Indictment No. 61-111-112

PEOPLE OF THE STATE OF ILLINOIS

—vs—

DON RICHARD LEGO

MOTION TO SUPPRESS CONFESSION

Now comes your petitioner, DON RICHARD LEGO, and moves this Honorable Court to suppress any statements oral or written taken from your petitioner and attempted to be introduced in evidence by the prosecution in the above matter, by reason of the fact that said statements were given by your petitioner under duress, violence, and threats, and were not freely and voluntarily made by your petitioner, DON RICHARD LEGO.

THEREFORE, under the laws of the State of Illinois and the Constitution of the United States, your petitioner demands that said statements be suppressed and not be permitted to be received into evidence in the above entitled cause.

/s/ Don Lego
Petitioner

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

DON RICHARD LEGO, being first duly sworn on oath deposes and says that he has read the foregoing petition by him subscribed, and that the contents therein set forth are true, except as to the matters which are stated on information and belief, and as to those matters he believes them to be true.

/s/ Don Lego

Subscribed and Sworn to before me this 21 day of February A.D. 1961.

/s/ [Illegible]
Notary Public

[Filed Feb. 21, 1961, John J. Altman,
Clerk of Criminal Court]

And the Court hearing the Testimony of Witnesses.

And the Court hearing Counsel for said Defendant in support of said motion to Suppress Confession as well as the State's Attorney, Counsel for the People, in opposition thereto and the Court being fully advised in the premises, doth DENY said motion and orders that said motion in this cause be and the same is hereby DENIED accordingly.

PLEA of NOT GUILTY heretofore entered to the indictment in this cause.

And now issue being joined, it is ordered that a Jury come. Thereupon come a Jury of good and lawful men and women, to-wit:

Fred. Bartizal	Howard J. Elliott
Margaret Delaney	Anna Koenigshofer
Toby Joseph Apicella	Stephanie M. Chocola
Margaret Douglas	William H. Caldwell
Ada Browne	Emily F. Cramer
Francis Buczkowski	James M. Keivers

who were duly impaneled and sworn.

It is ordered by the Court that this cause be and the same is hereby continued to February 23rd, A. D. 1961.

* * * *

[fol. 89] THE COURT: The motion to suppress the confession is denied.

The petitioner has admitted under oath he had a struggle with the complaining witness over the gun; he was wounded, obtained a facial wound. The Officers testified he was bloody at the time he was arrested.

I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself. The Motion to suppress is denied.

Call a jury. Bring in a jury. Call a jury.

* * * *

[fol. 91] THE COURT: * * *

* * * *

The issue in this case for your determination is whether or not the defendant is guilty as charged in the indictment. If selected as jurors in this case and before retiring for your deliberations the Court will [fol. 92] fully advise you as to the law in the case in the form of written instructions which will be read to you and which you may take with you to your jury room.

* * * *

The law in this case will be given to you by the Court [fol. 93] and you are bound to take the law as the court gives it to you and apply it to the facts in the case as you find them.

The defendant is presumed to be innocent and that presumption stays with him throughout the trial until

and unless it is overcome by evidence which convinces you of his guilt beyond a reasonable doubt. The burden of proof is on the State to prove the defendant guilty beyond a reasonable doubt and that burden never shifts.

* * * *

[fol. 272] The jury are the sole judges of the facts in the case, the credibility of the witnesses, and the weight to be given to their testimony. * * *

GIVEN:

* * * *

[fol. 273] The jury are the sole judges of the credibility of the witnesses. Your verdict will not necessarily be determined by the number of witnesses testifying for either side. You may take into consideration the number of witnesses testifying in support of or against any fact or state of facts, the opportunities of the several witnesses for knowing the things about which they testify, their conduct and demeanor while testifying; their age, discretion and experience; their bias or lack of bias, their interest, if any, in the result of the trial, the probability or improbability of the truth of their several statements; the relation which they bear to either side and the extent to which any witness is contradicted or corroborated by any other credible evidence, if at all, and any evidence that tends to shed light on his or her credibility.

The same tests hereinabove given are to be applied to the testimony given by the defendant. You have no right to disregard the testimony of the defendant simply because he is accused of crime.

GIVEN:

[fol. 274] The indictment in this case is not to be considered as any evidence or presumption of guilt against the defendant. It is a mere formal charge necessary to place the defendant upon trial. The defendant under the law is presumed to be innocent of the charge in the indictment and this presumption remains throughout the trial with the defendant until you have been satisfied by the evidence in the case beyond all reasonable doubt

of the guilt of the defendant. This presumption of innocence is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of the law intended, as far as human agencies can, to prevent an innocent person from being convicted. Throughout this case the burden of proving the guilt of the defendant beyond all reasonable doubt is on the State and the law does not require the defendant to prove his innocence.

If you are convinced from all the evidence in the case beyond all reasonable doubt that the defendant is guilty as charged in the indictment, it is your duty to find such defendant guilty. If you are not convinced from the evidence beyond all reasonable doubt of the guilt of the defendant, it is your duty to find such defendant not guilty.

* * * *

GIVEN:

SUPREME COURT OF THE UNITED STATES

No. 6046, October Term, 1970

DON RICHARD LEGO, PETITIONER

v.

JOHN TWOMEY, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question 1 as set forth in the petition which reads as follows:

"1. Was the Illinois evidentiary rule for determining the voluntariness of extra-judicial confessions so highly unreliable as to contravene the Appellant's Fourteenth Amendment Due Process rights and, necessarily, deprive the Appellant of the Fifth Amendments right against self-incrimination because:

(a) The trial judge in his preliminary determination, removed from the jury, need not find the confession voluntary beyond reasonable doubt when judging its admissibility as evidence for the jury; and

(b) The defendant, as a matter of Illinois law, was precluded from having the jury instructed upon, and to determine the voluntariness of the confession along with the other factual issues upon which the jury verdict must rest?"

March 29, 1971

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IN THE

Supreme Court of the United States

No. 70-5037

DON RICHARD LEGO,

Petitioner

v.

JOHN TWOMEY, Warden

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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JOHN TWOMEY, Warden

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The order of the Court of Appeals affirming the denial of the petition for habeas corpus (App. 21-22) is unreported. The decision of the District Court dated January 13, 1970, denying the petition (App. 13-18) is reported at 308 F. Supp. 38. The earlier memorandum opinion of April 15, 1969 (App. 8-10) and the memorandum on application for a certificate of probable cause to appeal in forma pauperis

(App. 19-20) are unreported. The 1965 opinion of the Supreme Court of Illinois (Appendix A, pp. 1a-5a, *infra*) affirming petitioner's conviction is reported at 32 Ill. 2d 76, 203 N.E.2d 875.

JURISDICTION

The order of the Court of Appeals affirming the denial of the petition for habeas corpus was entered on October 8, 1970. The petition for a writ of certiorari was filed on October 20, 1970, and was granted on March 29, 1971. Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Under this Court's limited grant of certiorari the following questions are presented:

1. Whether a standard other than proof beyond a reasonable doubt may constitutionally be utilized by a trial judge making a preliminary determination under *Jackson v. Denno*, 378 U.S. 368 (1964), as to the voluntariness of a criminal accused's confession sought to be introduced by the prosecution.

2. Whether the trial judge's conclusion that a confession has been voluntarily given is binding on the trial jury and forecloses the jury's independent consideration of the issue of voluntariness.

STATEMENT

Petitioner was charged in a two-count indictment returned on January 12, 1961, in the Superior Court of Cook County, Illinois, with armed robbery committed against one Raymond Termunde on January 1, 1961 (Supp.R.[1] 1-4). Counsel was assigned for him on January 19, and trial was set for February 21, 1961 (Supp.R. 7-11). On the date of trial, petitioner moved to suppress a statement taken from him at the time of his arrest on the ground that it had been given involuntarily (App. 23). A note handed by petitioner to his counsel and read to the court at the outset of the trial stated that petitioner had, on his arrest, taken a "beating * * * about the head and spine, by one, Stanley Thoms, Police Chief of Alsip, Illinois" and that this beating had caused him to "suffer from blackout spells" (Supp. R. 35).

The trial court thereupon held a hearing on the voluntariness of the confession. The evidence at the hearing established that petitioner had been arrested at the home of the victim—which was the scene of the crime—by the chief of police of the village of Alsip, who was a neighbor and old classmate of the victim (Supp.R. 42-43) and who arrived on the scene in answer to a telephone call (Supp.R. 41).[2] Petitioner was taken from the scene of the crime to the one-room Alsip police station in a police car, and the disputed confession was made in answer to questions asked at the station (Supp.R. 38). There was a conflict in the testimony as to whether petitioner had been beaten over his head and neck with the butt of a gun by Chief Thoms in the police car and kicked and beaten by a police lieutenant after arriving at the station. Petitioner testified that he had been so

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[1] "Supp.R." indicates the "Supplement to original record on appeal filed April 29, 1970" which contains the original indictment and trial transcript.

[2] The victim's daughter, who was in the home with her two brothers and her father, testified during the trial that she called the chief of police at her father's instructions (Supp. R. 175).

beaten (Supp.R. 75-76, 78-79), and that the lieutenant told him that he would "be lucky if [he] was . . . delivered to the County Jail without being killed" because his victim (who testified at trial) "was well thought of." (Supp.R. 79). Chief Thoms and four police officers (including the lieutenant specified by the petitioner) denied having beaten petitioner or seeing any other police officer beating him (Supp.R. 40, 50, 57, 64, 93, 101-102, 106, 111-113).

Introduced into evidence by petitioner in the course of the hearing was a photograph taken of him at the County Jail on the day after his arrest (Supp.R. 59). The photograph apparently showed the left side of petitioner's face to be swollen (Supp.R. 60), and also showed traces of blood on his face (Supp.R. 90).[3] Although petitioner admitted having had a "scuffle" with the victim in which his face was scratched (Supp.R. 76, 85-86), he testified that the condition of his face shown on the photograph was attributable to the beating with the gun butt he had received from Chief Thoms in the car (Supp.R. 75-76, 83-84). He also testified that he was examined and treated by doctors on the night of January 1 and again on his arrival at the jail on January 2 (Supp.R. 83-85). Chief Thoms testified that petitioner "had this blood on his face" when he first saw him on entering the victim's home (Supp.R. 45, 48), and the police officer who had been at the scene of the crime supported his chief's testimony (Supp.R. 63, 67-68).

The confession—which, in its written form, was read to the jury at petitioner's trial (Supp.R. 238-241)—was reduced to nineteen questions and answers, at the conclusion of which the following appeared (Supp.R. 241):

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[3]The photograph was introduced in evidence at the hearing, but is not in the original record here. Respondent's counsel has assisted petitioner's counsel in efforts to find it, but these have proved fruitless. There seems, however, to be no dispute over the fact that petitioner's face showed some laceration on the date in question, the only conflict being over the source of the wounds.

> After reading the above statement, and having given the above answers, knowing them to be the truth, and being able to read and write English, and having no promises or threats being made to sign this statement will you do so?
>
> My answer is no. I refuse to sign this statement. I wish to see a doctor and an attorney.

In addition to the written answers, Chief Thoms testified in the presence of the jury that petitioner told him that he had come to Alsip because "they were too hot after me in Chicago" (Supp.R. 201) and that petitioner had also said, "You can't do nothing to me anyway, I am on dope" (Supp. R. 202).

Petitioner testified that he answered the questions because he had been beaten and then threatened by the lieutenant in the police station (Supp.R. 81). Before the jury, petitioner repeated that he had given the statement "under threats" and that "[t]hey try to make me sign it by threats but I didn't sign it but I did give them the statement" (Supp. R. 259). He did not, however, challenge the truth of the answers given in the statement (*ibid.*).

Two individuals who had, according to the police officers' testimony, observed petitioner's arrest and interrogation were not called to testify. One was a local judge who was asked by Chief Thoms to witness the interrogation (Supp.R. 39, 54), and the other was a teen-age boy who was in the car in which Thoms brought petitioner to the station (Supp.R. 115).

At the conclusion of the hearing, the trial judge denied the motion to suppress. He said (App. 25):

> The petitioner has admitted under oath he had a struggle with the complaining witness over the gun; he was wounded, obtained a facial wound. The Officers testified he was bloody at the time he was arrested.

> I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself.

The prosecution's witnesses during the jury trial were the victim, his daughter, Chief Thoms, and two of the police officers. The written questions and answers were read to the jury at the conclusion of the prosecution's case. The only witness for the defense was the petitioner, who testified that he had been in a stupor under the influence of alcohol and barbiturates during the time of the offense (Supp. R. 247-250).

Although petitioner's testimony regarding the threats made to him was admitted (Supp.R. 257-259) and Chief Thoms testified in rebuttal that he had not beaten or otherwise done bodily harm to the petitioner (Supp.R. 277-278), the jury was not instructed to make any separate evaluation of the voluntariness of the confession (Supp.R. 303-311). Reference was made to the confession during the initial and rebuttal summations of the prosecutors (Supp. R. 286, 287, 299). The jury found petitioner guilty of armed robbery and he was sentenced to a 25-to-50-year term of imprisonment (Supp.R. 324).

On direct appeal to the Supreme Court of Illinois, the conviction was affirmed. 32 Ill. 2d 76, 203 N.E.2d (pp. 1a-5a, *infra*). Recognizing that it "may have been better practice for the State to have called Judge Robinson and the boy" (p. 4a, *infra*), the Illinois Supreme Court held that "the trial judge's ruling that the confession was voluntary was not against the manifest weight of the evidence" (*ibid.*).

Petitioner instituted the present proceeding on April 8, 1969, by filing a petition for habeas corpus in the United States District Court for the Northern District of Illinois (App. 3-7).[4] The petition squarely presented the issues

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[4]He had sought federal and State post-conviction remedies on three earlier occasions. See note 1 of the District Court's opinion of January 13, 1970 (App. 13).

now before this Court on the limited grant of certiorari. After first denying the petition on the ground that petitioner had not exhausted his State remedies (App. 8-10), District Judge Hubert Will granted a petition for rehearing and considered the merits of the constitutional claim (App. 13-18). He concluded that the Illinois procedure whereby, in a preliminary hearing, a judge decides, by the standard of proof "normally used to determine the admissibility of evidence" (App. 17), whether an accused's confession was voluntarily given satisfies the constitutional requirements. He also held that an accused is entitled only to "one forum where the voluntariness issue can be evaluated without any regard to its truth" (App. 18) and, apparently on this basis, rejected the claim that the voluntariness of the confession should have been submitted to the jury.

Judge Will then found that "a determination of the question by the Court of Appeals would be helpful" (App. 20) and granted leave to appeal in forma pauperis. The Court of Appeals, however, refused to assign counsel[5] or hear oral argument. In a brief order, it affirmed the judgment of the District Court (App. 21-22).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, in its present posture, challenges two aspects of the procedure prescribed by the decisions of the highest court of the State of Illinois for determining the voluntariness of an accused's post-arrest confession. No claim is made here—nor was any made below—that the hearing given petitioner on the factual issue in the trial court was inadequate in any other respect. We have, however, sketched the outline of the conflicting testimony relating to the confession in our Statement because we believe that it demonstrates that a reasonable trial judge, considering the demeanor of the witnesses, could have concluded that a reasonable

[5] Order of March 24, 1970, appended to the Petition for a Writ of Certiorari.

doubt existed as to whether petitioner's statement was voluntary. Both the condition of petitioner's face on the day after his arrest and the fact that he refused to sign the statement after it was reduced to writing—and asked instead to see a doctor—tended to support his version of the events. In this context, the issue of burden of proof became all-important.

1. Although the trial judge made no specific mention of the standard he used in deciding that the confession was voluntary, it may be fairly assumed that he applied Illinois law. In *People v. Thomlinson*, 400 Ill. 555, 561, 81 N.E.2d 434, 437 (1948), the Illinois Supreme Court held that a trial judge may admit an accused's confession in evidence if he is satisfied, on a preponderance of the evidence, that it was voluntarily given. That standard, we submit, violates the Fourteenth Amendment rights of the petitioner because it is an inadequate criterion by which to make this critical determination in a criminal case.

We contend that the proper standard—approved by most of the federal courts which have considered the issue—is that the confession must be shown to have been voluntary beyond a reasonable doubt. We argue that this is the proper standard for all preliminary determinations regarding evidence allegedly obtained in violation of the Constitution. We also maintain, alternatively, that when evidence which the prosecution seeks to admit may infringe on the Fifth Amendment privilege against self-incrimination and is as probative of guilt or innocence as a post-arrest confession, the Constitution requires that its voluntariness be determined by the reasonable-doubt standard. And finally, we point out that when, as is true under Illinois procedure, the jury has no option to disregard the confession entirely if it finds it involuntary, the use of a standard lower than beyond-a-reasonable-doubt weakens the protection given a criminal defendant by this Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), and puts him to an intolerable choice at trial.

2. No instruction was given to the jury on the question of the voluntariness of the confession, and under Illinois law "it is the function of the trial judge to determine [whether the confession was voluntary] * * *, and the jury can determine only the weight to be given to a confession once the trial court has ruled that it is admissible." *People v. Stacey*, 25 Ill.2d 258, 269, 184 N.E.2d 866, 871 (1962).[6]

We argue that this procedure—particularly when combined with a lower standard of proof than beyond-a-reasonable-doubt—violates the rule of *Jackson v. Denno, supra*, as well as the constitutional right to a trial by jury recognized in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

ARGUMENT

I. THE VOLUNTARINESS OF A CONFESSION SHOULD BE DETERMINED BY THE SAME CONSTITUTIONAL STANDARD OF PROOF APPLICABLE FOR EVERY ESSENTIAL ELEMENT OF AN OFFENSE.

In *In re Winship*, 397 U.S. 358 (1970), this Court—resolving any remaining "doubt about the constitutional stature of the reasonable-doubt standard"—squarely and unequivocally held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

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[6] In *People v. Guido*, 321 Ill. 397, 420, 152 N.E. 149, 158 (1926), the Supreme Court of Illinois said:

> Whether the confessions are of such a character as to entitle them to be considered by the jury is a question for the court. Whether they are true or false or partly true and partly false is a question for the jury. When confessions or admissions have been admitted in evidence the jury cannot disregard them but are bound to consider and weigh them and give them such credit as they may be entitled to in the judgment of the jury. The statement that it is the duty of the jury to disregard confessions unless they are satisfied beyond a reasonable doubt that they were made freely and voluntarily is contrary to the law as heretofore stated in this opinion.

which he is charged." 397 U.S. at 364. Only Mr. Justice Black dissented from that part of the Court's decision, the other two dissenting Justices (the Chief Justice and Mr. Justice Stewart) disagreeing merely with the majority's application of that standard to juvenile court proceedings. The initial issue in this case is whether the now-clear Fourteenth Amendment standard of proof governing "every fact necessary to constitute the crime" also applies to the voluntariness of a confession sought to be introduced by the prosecution as part of its direct case. We argue below that the reasonable-doubt standard is constitutionally mandatory when the voluntariness of a confession is put in issue on three grounds:

1. We contend first that whenever in a criminal trial the admissibility of any evidence is challenged on the ground that it was unconstitutionally secured, the prosecution must satisfy the finder of fact, by the reasonable-doubt standard, that the evidence to be introduced was lawfully obtained. This argument, which is based on the importance to the administration of justice of insuring that the protection given by the reasonable-doubt standard is not undermined by the use of lesser standards of proof in preliminary decisions to admit evidence, closely follows the careful analysis given this issue in *United States v. Schipani*, 289 F. Supp. 43, 54-60 (E.D.N.Y. 1968), *affirmed on conviction*, 414 F. 2d 1262 (2d Cir. 1969), the relevant portion of which is reprinted as Appendix B to this brief (pp. 1b-12b, *infra*).

2. Our second argument is that irrespective of the rule which may be applied to situations involving other kinds of unconstitutionally obtained evidence, the gravity of the harm resulting from the introduction of an accused's confession and the nature of the constitutional right being protected permit only confessions proved voluntary beyond a reasonable doubt to be used as evidence. That argument follows the reasoning of the Court of Appeals for the District of Columbia Circuit on rehearing en banc in *Pea v. United States*, 397 F.2d 627, 637 (1967), adopting the concurring opinion in *Clifton v. United States*, 371 F.2d 354,

360 (1966). The relevant portions of those opinions are reprinted as Appendix C to this brief (pp. 1c-7c, *infra*).

3. Our third argument is that the establishment of a reasonable-doubt standard for preliminary determinations of voluntariness is necessary to carry out the additional safeguard to a criminal accused granted by this Court's decision in *Jackson v. Denno*. 378 U.S. 368 (1964). For if a lesser standard of proof is permitted to render a confession admissible on the judge's preliminary consideration of voluntariness, less protection is given to an accused whose confession cannot be proved voluntary beyond a reasonable doubt under the *Jackson v. Denno* rule than under the procedure found constitutionally invalid in that case.

A. A Trial Judge's Ruling on Whether Prosecution Evidence Has Been Unconstitutionally Obtained Must be Made by the Reasonable-Doubt Standard.

There can be no doubt since *In re Winship, supra,* as to the quantum of proof constitutionally required in a State prosecution for every factual element of an offense. And in *Chapman v. California,* 386 U.S. 18 (1967), the very same strict standard was applied by this Court to the administration of the "harmless-error rule"—*i.e.*, to insure that a criminal defendant is not prejudiced by constitutional error committed at his trial, an appellate court may affirm his conviction only if it is "able to declare a belief that [the constitutional error] was harmless beyond a reasonable doubt." 386 U.S. at 24.

The heavy burdens fixed by *Winship* and *Chapman* rest on fundamental policy assessments regarding criminal justice and the judicial process such as those expressed by Mr. Justice Harlan in his concurring opinion in *Winship*. 397 U.S. 368-375. Essentially, they come down to the proposition that "we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty." 397 U.S. at 372. The requirements of "fundamental procedural fairness," there-

fore, demand that the facts upon which a conviction rest be so unequivocally established by the proof at trial that no reasonable doubt remains.

The *Winship* and *Chapman* decisions, in combination, require that the reasonable-doubt standard be applied to *all* preliminary factual determinations regarding prosecution evidence that has allegedly been obtained by unconstitutional means. For if a lesser standard of proof is permitted at this juncture, the constitutional assurance can be undermined by preliminary determinations on admissibility made on proof which is less than clear and convincing.

The effect of a rule such as that permitted by the courts below in this case was carefully analyzed in *United States v. Schipani*, 289 F.Supp. 43 (E.D.N.Y. 1968), on remand from this Court (385 U.S. 372), by District Judge Jack B. Weinstein (formerly Professor of Evidence at Columbia University Law School), as follows (289 F.Supp. at 56-57; pp. 7b-8b, *infra*):[7]

> Let us suppose, solely for the sake of analysis, that the burden on the government is to prove by a preponderance that a proferred document with high probative force was not obtained in violation of the law. Assume that exclusion depends upon an extrinsic policy designed to protect constitutional rights and to discourage obtaining evidence illegally. Suppose that the only material proposition in the case is whether defendant had certain knowledge (as that the power he possessed was a narcotic). Let us suppose that the only evidence on the point is a letter from the defendant and that it would permit a jury to find beyond a reasonable doubt (95+% probable, for the purposes of this analysis) that he did have knowledge.
>
> Now, if we suppose that the judge has decided that there is a question about whether the docu-

[7] On appeal from the conviction, the Court of Appeals for the Second Circuit stated, with regard to this aspect of the case, "We approve the legal principles applied." 414 F.2d at 1266.

ment was illegally obtained but that there is a bare preponderance (50+% probable) in favor of the government's contention that it was legally obtained, the judge will, on the assumptions made, admit it. The question of whether the document was or was not illegally obtained is not considered by the jury and normally it will not have before it evidence bearing on this question. Thus, the jury will give the document its full probative weight and it will find the defendant guilty beyond a reasonable doubt.

Whether such a result in a criminal case is proper depends upon how the rule of law is stated. If it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by evidence properly admitted in the trial*" the verdict should stand. The trier might have concluded that the probability of knowledge was 95+% if he assessed the document solely on the basis of its probative force. However, if it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by legally obtained evidence*," there is doubt about the validity of the conviction. If the probative force is discounted by the probabilities relating to the illegality, then the total probative force of all the relevant evidence might well have fallen below 95+%. The documentary line of proof would not then have a force of 95+% probability but of (95+ x 50+)%, or somewhere in the order of $50+%. See Ball, the Trial Court: Probability Theory and Jury Issues, in Communication Sciences and Law: Reflections from the Jurimetrics Conference, 189-90 (Allen and Caldwell, eds., 1965).

This attenuation of probabilities results from the fact that, where variables are independent and the probability of a combination of variables is to be determined, the probability of each variable is multiplied by the probability of each other variable. See, e.g., Hoel, Elementary Statistics, 56-63 (1966); Keynes, A Treatise on Probability, 121, 135-136 (1952). Probative force and illegality are sufficiently

independent to justify multiplying them for the purposes of this analysis. Where the probability of one of two variables approaches 100% the product will, of course, approximate the probability of the less probable variable.

Applying this analysis to facts such as those in this case, it is surely possible that the jury in this case—which was not instructed separately that it was to ignore petitioner's confession if involuntary (see pp. 20-21, *infra*)—considered as critical evidence of petitioner's guilt a confession which the trial judge had found voluntary only by a bare preponderance of the evidence. If so, the constitutional safeguard against conviction of an innocent man has been breached.

Moreover, this Court's *Chapman* decision demonstrates that in the area of constitutional violations, great importance attaches to the degree of certainty with which it can be said that there was no infringement on an accused's constitutional rights. Just as the Court held in *Chapman* that the need for certainty warranted application of the reasonable doubt standard, that standard should be applied in determining whether there was a violation and whether evidence used by the prosecution was secured as a result of such violation.

B. The Reasonable-Doubt Standard Should Apply Here Because of the Devastating Effect of a Confession and the Importance of Protecting Against Compulsory Self-Incrimination.

The above argument proceeds on the premise that the same burden of proof applies to the preliminary determination made by a trial judge on factual questions relating to *all* alleged constitutional violations affecting the admissibility of evidence. In other words, it assumes that the factual findings underlying the voluntariness of a confession are to be treated in the same manner as findings relating to the reasonableness of a search or to the identification of an accused at a post-arrest lineup. Even assuming, however,

that the Court does not view all such fact determinations as requiring the same high standard of proof, we submit that at least when the voluntariness of a confession is at issue it is appropriate that proof beyond a reasonable doubt be required of the prosecution. And when, as is true under the Illinois procedure, the trial judge's conclusion as to admissibility is the final word on the question whether the confession was involuntary, that conclusion may not constitutionally be based on any lesser standard.

The constitutional rule forbidding introduction in evidence of an involuntary confession is based, as this Court has observed, on a "complex of values" (*Blackburn v. Alabama*, 361 U.S. 199 (1960)) which includes, in addition to the "feeling that the police must obey the law," the probable unreliability of an involuntary admission and the importance to our society of preserving the individual freedom of will secured by the Fifth Amendment's privilege against self-incrimination. *Ibid.* See also *Miranda v. Arizona*, 384 U.S. 436, 458-460 (1966). These additional "values" are endangered when an allegedly involuntary confession is sought to be used against an accused, and the issues presented for decision in such a case are, therefore, unlike those in situations where the sole basis for excluding evidence is that exclusion is a necessary prophylactic against impermissible police conduct.[8]

Moreover, an accused's confession—unlike real evidence subject to seizure—is likely to have great probative value on the ultimate factual question of guilt or innocence. As Lord Justice Devlin said in a statement quoted with approval in the opinion announcing the judgment of this Court in *Culombe v. Connecticut*, 367 U.S. 568, 576 (1961), "The least criticism of police methods of interroga-

[8] Indeed, in the landmark involuntary-confession decision of this Court—*Brown v. Mississippi*, 297 U.S. 278 (1936)—the "Exclusionary Rule" applicable to unconstitutional seizures announced more than twenty years earlier in *Weeks v. United States*, 232 U.S. 383 (1914), was not even cited.

tion deserves to be most carefully weighed because the evidence which such interrogation produces is often decisive; the high degree of proof which the English law requires—proof beyond reasonable doubt—often could not be achieved by the prosecution without the assistance of the accused's own statement." Devlin, *The Criminal Prosecution in England* 58 (1958). Consequently, the question whether the confession was properly or improperly obtained is much more central to the ultimate issue of guilt or innocence than is true in the usual search-and-seizure case involving the Exclusionary Rule.

It is doubtless on account of this "complex of values" surrounding an accused's post-arrest statements that this Court found it necessary to impose "proper safeguards" on in-custody interrogation in *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). While those "safeguards" insure that, on admitted facts regarding an arrest and interrogation, an accused will have the knowledge needed to decide whether or not to make a voluntary statement, they do not secure the integrity of the factfinding process. That result is most effectively achieved by bringing under the reasonable-doubt standard the factual issue whether the confession was voluntarily given.

This was essentially the reasoning of the Court of Appeals for the District of Columbia Circuit in *Pea v. United States*, 397 F.2d 627, 637 (1967). Following the square holding to the same effect by the Court of Appeals for the Fourth Circuit in *United States v. Inman*, 352 F.2d 954 (1965), and *Mullins v. United States*, 382 F.2d 258 (1967), and decisions of several other circuits implying that there is a higher standard in determinations concerning the voluntariness of a confession than in other fact questions affecting the admissibility of evidence,[9] the D.C. Cir-

[9] *E.g., United States v. Feinberg*, 383 F.2d 60, 70 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968) (independent judicial determination); *Fisher v. United States*, 382 F.2d 31, 34 (5th Cir. 1967) ("clear cut determination" on the record); *Moser v. United States*, 381 F.2d

cuit held in an *en banc* decision that the prosecution was obliged to prove voluntariness of a confession beyond a reasonable doubt "as a sound implementation of the public interest in preventing involuntary confessions from playing any part in a jury's determination of guilt." 397 F.2d at 638. As explained in the concurring opinion in *Clifton v. United States*, 371 F.2d 354, 360 (D.C. Cir. 1966), adopted by the majority of the *en banc* court in *Pea*, this conclusion was mandated by "the distinctive nature of the voluntariness determination." 371 F.2d at 362. As the court explained, that determination "relates to a matter which is usually the key item in the proof of guilt, and certainly one of overpowering weight with the jury." *Ibid.*

State courts have reached the same result. The Minnesota Supreme Court, for example, held in *State v. Keiser*, 274 Minn. 265, 143 N.W.2d 75 (1966):

> It should be conceded that in many instances the impact of a voluntary confession admitted in evidence is so devastating as to almost assure a verdict of guilty. Under such circumstances, the trial court takes an important part in making a fact determination. That being the case, it would seem to us that the evidence of voluntariness should be of such persuasive force as to satisfy the court to a moral certainty or beyond a reasonable doubt that a confession was voluntarily given.

See also *State v. Ragsdale*, 249 La. 420, 187 So.2d 427 (1966); *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179 (1965); *State v. Longmore*, 178 Neb. 509, 139 N.W.2d 66 (1965). Compare *State v. Yough*, 49 N.J. 487, 231 A.2d 598 (1967), where the Supreme Court of New Jersey considered the issue and held that this Court's decision in *Jackson v. Denno, supra*, did not make the reasonable-doubt standard constitutionally applicable to past cases but warranted its use in the future.

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363 (9th Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); *Evans v. United States*, 375 F.2d 355, 360 (8th Cir. 1967) ("unmistakable clarity").

C. Unless the Reasonable-Doubt Standard is Applied, the Protection Afforded by Jackson v. Denno Works to the Disadvantage of an Accused.

Dissenting from the Court's decision in *Jackson v. Denno*, 378 U.S. 368 (1964), Mr. Justice Black noted that the majority opinion had failed "to say anything about the burden of proving voluntariness" (378 U.S. at 404-405). He observed that if the Court's rule required only that voluntariness be established by a preponderance of the evidence, it "is a distinct disadvantage to the defendant" as compared with the New York practice found invalid. *Id.* at 405.

The majority opinion in *Jackson* quoted the instruction given the jury by the trial court—which contained no specific reference to any standard of proof—and observed that there had been no issue raised "as to whether these instructions stated an adequate and correct federal standard for determining the voluntariness of Jackson's confession." 378 U.S. at 375, n. 5. That issue is raised here, and we submit that the reasoning of *Jackson v. Denno* and the protection its rule sought to afford to criminal defendants requires its implementation with the reasonable-doubt standard.

A comparison of two respects in which the *Jackson v. Denno* procedure altered earlier New York law demonstrates the unsoundness, under the reasoning of that case, of permitting a trial judge to arrive at his conclusion on less than proof-beyond-a-reasonable-doubt:

First, under the former New York practice, the jury was instructed to disregard the confession unless it determined, beyond a reasonable doubt, that it had been voluntarily given. See *Stein v. New York*, 346 U.S. 156 at 173 n. 17 (1953). This was substantial protection for an accused whose version of post-arrest events differed from the testimony given by police officers and who could establish a reasonable doubt as to whether the officers were telling the truth. Because of the probability that a jury's consideration of guilt or innocence would affect its decision on voluntariness (and vice versa), the Court held that the procedure

posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined." 378 U.S. at 389.

Under the standard approved by the courts below, however, the right to have an involuntary confession "entirely disregarded" and to have the "coercion issue * * * reliably determined" is more diluted than it was by the New York procedure. For on a bare preponderance of the evidence, the petitioner's confession was launched for the jury to consider as it wished—without the careful scrutiny a higher standard would have required. Is it clear that criminal defendants face greater "hazards" (378 U.S. at 389) from the unitary New York system—which cautions the jury on the treacherousness of confessions and requires proof of voluntariness beyond a reasonable doubt before a confession may be considered at all—than from a two-phased proceeding in which the only restraint on the factfinder is whether it is more likely than not that a confession was voluntary? We submit that many criminal defendants would prefer, in these circumstances, the frying pan of the New York practice to the fire of a trial judge's finding of probabilities.

Second, the Court referred tangentially in *Jackson v. Denno*, 378 U.S. at 389, n. 16, to the dilemma in which the unitary New York practice placed the defendant who might wish to testify on the voluntariness of his confession but not be cross-examined on other issues and impeached by prior convictions. That "obstacle" is inadequately overcome if the trial judge, by making a finding on probabilities, can force the defendant to a similar choice—either permit the confession to go unchallenged or be subject to impeachment. If the protection afforded by *Jackson v. Denno* is to be made meaningful, no lower a standard than proof-beyond-a-reasonable-doubt should be required before the confession is submitted for the jury's scrutiny and for such rebuttal as the defendant feels called upon to make.

II. A CRIMINAL DEFENDANT IS CONSTITUTIONALLY ENTITLED TO A JURY DECISION ON THE FACTUAL ISSUE OF VOLUNTARINESS OF HIS CONFESSION.

Under established Illinois law, a defendant whose confession has been ruled voluntary by the trial judge may not challenge that issue before the jury; he is limited to attacking the weight and credibility of the confession. Particularly where the judge's decision is based only on a balance of probabilities—*i.e.*, where he may admit the confession if he determines that a bare preponderance of the evidence supports a conclusion of voluntariness—this foreclosure of a factual issue violates the Fourteenth Amendment.

The fundamental policy underlying the jury-trial guarantee of the Sixth Amendment, made applicable to the States by the Fourteenth Amendment and *Duncan v. Louisiana*, 391 U.S. 145 (1968), supports petitioner's position.[10] That constitutional right was designed to give an accused "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge." 391 U.S. at 156. Nowhere is this protection more important than with respect to allegations of governmental misconduct, and particularly overreaching in violation of the Fifth Amendment's privilege against self-incrimination. For if the final decision on whether to believe police officers who testify that a post-arrest confession was freely given or an accused who swears that it was coerced is withdrawn from "the common-sense judgment of a jury" and entrusted exclusively to "the more tutored but perhaps less sympathetic reaction of the single judge" (391 U.S. at 156) a basic safeguard against "unchecked power" (*ibid.*) in an area where it is most likely to be exercised has been removed.

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[10]We recognize, of course, that *Duncan* has only prospective effect. *DeStefano v. Woods*, 392 U.S. 631 (1968); *DeBacker v. Brainard*, 396 U.S. 28 (1969). However, we submit that the policies and rationale of the *Duncan* decision should apply to considerations such as those at issue here.

It is no answer to say that a jury which, notwithstanding the judge's finding, believes a confession to be involuntary will ignore it. If it is not specifically authorized to do so and if an accused's counsel may not argue to it, in summation, that an involuntary confession is entitled to no consideration whatever, the very "hazard" that this Court envisioned in *Jackson v. Denno* is likely to occur—*i.e.*, the jury will probably consider the confession truthful and base a conviction upon it, even while condemning the police conduct. 378 U.S. at 388.

We recognize that the Court's opinion in *Jackson v. Denno* describes a procedure whereby "the judge himself solely and finally determines the voluntariness of the confession" as "the orthodox rule." 378 U.S. at 378. But we note that in the Appendix to the majority opinion, as well as in Mr. Justice Black's dissent and the Appendices thereto, there is considerable uncertainty as to whether the rule applied in a considerable number of jurisdictions is the "orthodox rule" or the "Massachusetts rule" (under which the jury separately determines voluntariness). Moreover, all the cited cases antedated *Duncan v. Louisiana, supra,* which recognized the essential nature of juries as factfinders, as well as *In re Winship, supra,* which made the reasonable-doubt standard the proper one for all criminal proceedings.

We submit, in conclusion, that the Illinois practice—which vests exclusive factfinding authority in the trial judge and authorizes him to admit in evidence an accused's confession on a finding that it is more probably voluntary than not—is too riddled with constitutional infirmities to be sustained. Whether either of these deficiencies, standing alone, would be enough to invalidate the practice need not be decided in this case. But the combination renders the procedure too unreliable and inadequately secures the rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

CONCLUSION

In this case, as in *Jackson v. Denno, supra*, the trial court's finding was unreliable, and the petitioner is entitled to a proper determination of his claim. In addition, he is entitled to have the jury consider his contention and disregard the confession if it is not satisfied that it was voluntarily given. Accordingly, the judgment below should be reversed with instructions to issue the writ of habeas corpus unless the State chooses to try petitioner anew under proper procedures.

Respectfully submitted,

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APPENDIX A

(No. 37712.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, v. DON RICHARD LEGO, Plaintiff in Error.

Opinion filed January 21, 1965

* * * * *

MR. JUSTICE SOLFISBURG delivered the opinion of the court:

The defendant, Don Richard Lego, was indicted in the criminal court of Cook County on the charge of robbery. He was tried by a jury; found guilty and sentenced by the court to a term in the penitentiary of not less than 25 nor more than 50 years. He prosecutes this writ of error from that judgment.

Defendant complains that he was denied due process of law, contending that a question of insanity was raised and the trial court erred in not conducting a sanity hearing before a jury pursuant to statute.

The basis for defendant's objection is that on the day of trial the public defender informed the court that he had just been handed a note written and signed by the defendant, which stated as follows: "I feel I am not competent to stand trial due to the fact I suffer from blackout spells." The attorney for the defendant then moved the court for a Behavior Clinic examination. This motion was denied by the court.

Although there was no formal request for a sanity hearing and no suggestion of insanity as such, defendant argues on appeal that the note and motion for a Behavior Clinic examination was sufficient to require the court to conduct a sanity hearing and that failure to do so was a violation of due process.

The trial, adjudication, sentence or execution of a person charged with a criminal offense, while insane, is a violation

of due process of law. (*People v. Burson*, II Ill.2d 360; *People v. Reeves*, 412 Ill. 555; *People v. Maynard*, 347 Ill. 422.) This court has held that a formal petition for a sanity hearing is not necessary. The question of a defendant's sanity may be raised by oral suggestions of counsel during the trial, and if made in good faith, it becomes the duty of the court to conduct a hearing before a jury upon the issue, and the denial thereof is a violation of due process. (*People v. Burson*, II Ill.2d 360; *Brown v. People*, 8 Ill.2d 540.) A trial judge has a duty to impanel a jury to determine whether an accused is capable of understanding the nature of the charges against him and of co-operating with his counsel whenever facts that give rise to a *bona fide* doubt as to the defendant's sanity are brought to the attention of the trial court, either from observation of the defendant or from suggestion by counsel. *People v. Harper*, 31 Ill.2d 51; *People v. Richeson*, 24 Ill.2d 182; *People v. Burson*, 11 Ill.2d 360.

Counsel's motion for a Behavior Clinic examination alone was insufficient to raise a *bona fide* question as to the defendant's capacity to stand trial. (*People v. Harper*, 31 Ill.2d 51; *People v. Cleggett*, 22 Ill.2d 471). The question, therefore, is whether all the facts presented to the trial court were sufficient to raise a *bona fide* doubt as to the defendant's sanity.

At no time did counsel for the defendant state that the defendant was unable to co-operate with him or was unable to comprehend the nature of the charges against him. Defense counsel did not contend that there were any other factors bearing on defendant's competency; he merely read to the court a self-serving note written by the defendant. The defendant testified lucidly and at great length with myriad details during the trial. His conduct and testimony gave eeryv indication that he was thoroughly oriented, aware of the nature of the proceedings and gave intelligent co-operation to his counsel, both on the hearing of the motion to suppress the confession and during the jury trial

itself. In our opinion there were not sufficient facts presented to the trial court to raise a *bona fide* doubt as to the defendant's sanity and therefore the trial judge was not required to conduct a sanity hearing.

Prior to the trial on the merits the defendant made a motion to suppress an oral confession reduced to writing, contending that the confession was given as a result of coercion. After hearing, the court denied the motion and the defendant urges error in this ruling.

The law is clear that only voluntary confessions may be used as evidence against an accused and that confessions procured through force, threats or offers of leniency are inadmissible. However, the question of the voluntary character of a confession is for the trial court to determine, and unless it can be said that the decision of the trial court is manifestly against the weight of the evidence, the decision of the trial court will not be disturbed. *People v. Weger*, 25 Ill.2d 370; *People v. Miller*, 13 Ill.2d 84; *People v. Townsend*, 11 Ill.2d 30.

The defendant claims that his oral confession was coerced by reason of a beating by the police in the squad car as he was being taken to the station and by a further beating while handcuffed in a chair in the police station and by police threats in the station. Defendant's claims are unsubstantiated and categorically denied by all the witnesses offered by the prosecution. While the trial court's decision on the motion to suppress was not against the manifest weight of the evidence, defendant complains that the confession was wrongfully admitted into evidence because the prosecution failed to call all the witnesses thereto or to satisfactorily account for their absence.

This court has established the rule that the State is required to produce all material witnesses on the issue of voluntariness of a challenged confession and that all such witnesses must be produced or their absence satisfactorily explained. (*People v. Sims*, 21 Ill.2d 425.) This rule, however, applies only to material witness and it is not necessary to call all

persons who may have seen the defendant during his incarceration and who had nothing to do with his supervision or confession. *People v. DeSimone*, 27 Ill.2d 406, 410.

Defendant argues that it appears that a police magistrate, one Judge Robinson, was called to the police station and was present for most of the time the defendant was held there. It also appears that a 17 or 18-year-old boy was present at the time the defendant was arrested and taken to the police station. Neither Judge Robinson nor the boy testified and it is claimed that the motion to suppress should not have been denied as both were material witnesses.

It is undisputed that the defendant, a 29-year-old admitted ex-convict, entered the home of Raymond Termunde and accosted Termunde and his three children with a gun, announcing, "This is a stickup." He took ninety dollars from Termunde, and then shot him in a subsequent scuffle. Defendant was arrested by the police while still in the Termunde home.

The defendant at the trial, while continuing to claim police brutality, testified that he would have made the statement anyway. We conclude that the trial judge's ruling that the confession was voluntary was not against the manifest weight of the evidence.

Under these circumstances, while it may have been better practice for the State to have called Judge Robinson and the boy, we cannot say that the failure to do so denied defendant due process or prejudiced him in any way. *People v. Krans*, 395 Ill. 233.

Defendant also contends that certain statements of the trial judge deprived him of a fair and impartial trial. We have examined the record and find this claim is entirely unsubstantiated. The instances cited in defendant's brief cannot be said to have prejudiced him, or denied him the right to a fair trial.

Upon the entire record it appears that defendant received a fair trial. He was caught red-handed and the evidence of

his guilt was conclusive. We therefore affirm the judgment of the trial court.

Judgment affirmed.

APPENDIX B

UNITED STATES of America, Plaintiff,

v.

Joseph F. SCHIPANI, Defendant.

No. 63 CR 237.

United States District Court
E.D. New York.
July 26, 1968.

* * * * *

OPINION AND ORDER

WEINSTEIN, District Judge.

* * * * *

II. APPLICABLE LAW

A. *Particular Items of Evidence*

1. *Is evidence to be excluded if it is obtained as a combined result of tainted and untainted leads?*

[1] The test laid down in *Silverthorne* is that evidence is admitted if it is obtained from an untainted "independent source" but excluded if it is obtained as the result of illegality. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319 (1920). In the case before us a more appropriate simile than the "fruit of the poisonous tree" (Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939)), is, perhaps, that of a tree nourished by both pure and polluted waters. In this circuit the tendency has been to find any appreciable pollution sufficient to taint the fruit. See United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962).

[2] If the evidence is discovered as a result of both legal and illegal leads, it is inadmissible. It does not matter that the legal lead would itself probably have sufficed to uncover the evidence. As the Court of Appeals for this cir-

cuit declared, it is not sufficient for the government to show that "in the normal course of events it might have discovered the questioned evidence without an illegal search":

> "a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possibilities." United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962).

See also Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 624-30 (1968) ("The logic of the 'inevitable discovery' . . . collides with the fundamental purpose of the exclusionary rule"); Note, Fruit of the Poisonous Tree Doctrine—A plea for Relevant Criteria, 115 U. of Pa. L. Rev. 1136, 1143 (1967) (defendant need not show that police "would not have discovered the challenged evidence 'but for' the illegal police conduct").

2. *What is the burden of proof?*

(a) *Common Law Rule*

[3] Once it becomes apparent that the issue is in the case (Maguire, Evidence of Guilt, 221 (1959)), the government bears the burden of convincing the court that evidence it seeks to introduce at a criminal trial was not obtained by it in violation of a defendant's constitutional rights.

There is lack of agreement about the weight of this burden. Some have suggested that it is by a preponderance. Clifton v. United States, 125 U.S. App. D.C. 257, 371 F.2d 354, 358-359 (1966), cert. denied, 386 U.S. 995, 87 S. Ct. 1312, 18 L.Ed.2d 341 (1967) (confession). Others use a variant of the phrase "clear and convincing evidence."

United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), cert. denied, 372 U.S. 906, 83 S.Ct. 717, 9 L.Ed.2d 716 (1963) (consent to search must be "proven by clear and positive evidence"); Fisher v. United States, 382 F.2d 31, 34 (5th Cir. 1967) (confession; "clear cut determination"); Evans v. United States, 375 F.2d 355, 360 (8th Cir. 1967), rev'd on other grounds sub nom. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (confession); United States v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962) (consent to search; "clear and positive testimony"); cf. United States v. Wade, 388 U.S. 218, 240, 87 S.Ct. 1926, 1939, 18 L.Ed. 2d 1149 (1967) (government could "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect" other than those made at the prior identification; reasons for standard not discussed). Still others have declared that "proof beyond a reasonable doubt" is required. Mullins v. United States, 382 F.2d 258, 261 (4th Cir. 1967) (confession); United v. Inman, 352 F.2d 954, 956 (4th Cir. 1965) (confession); Clifton v. United States, 125 U.S. App. D.C. 257, 371 F.2d 354, 360-364 (1966), cert. denied, 386 U.S. 995, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967) (concurring opinion) (confession); Pea v. United States, 397 F.2d 627, 633, n. 7 (D.C. Cir. 1968), (collecting cases in other jurisdictions; confession); United States v. Taglianetti, 274 F. Supp. 220, 226 (D.R.I. 1967) (electronic surveillance). Cf. Gillison v. United States, 399 F.2d 586, 588 (D.C. Cir. July 2, 1968) (state must show that line of questioning was harmless beyond reasonable doubt); United States v. Feinberg, 383 F.2d 60, 70, n. 10 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968) (citing New York standard of beyond a reasonable doubt in confession cases); People v. Johnson, 68 Cal. Rptr. 599, 609, 441 P.2d 111, 121 (May 28, 1968) (state must show beyond reasonable doubt that erroneous admission of prior inconsistent statement constituted harmless error). Mathes and Devitt, Federal Jury Practice and Instructions, §8.16 (1965) (jury to be instructed

not to use confession unless satisfied beyond a reasonable doubt that it was voluntary). Finally, there are opinions eschewing the opportunity to fix a standard. See, e.g., Jackson v. Denno, 378 U.S. 368, 405, 84 S.Ct. 1774, 12 L.Ed. 2d 908 (1964) (dissent) (question of weight of burden in confession cases left open); Pea v. United States, 397 F.2d 627, 639 (D.C. Cir. 1968) (dissent) (Supreme Court's refusal "to come to grips with problem"; others "have avoided the problem"); cf. United States v. Jordan, 399 F.2d 610, 614 (2d Cir. July 30, 1968) ("government had a heavy burden of proving voluntary consent" to search); Carlo v. United States, 286 F.2d 841, 848 (2d Cir.), cert. denied, 366 U.S. 944, 81 S.Ct. 1672, 6 L.Ed.2d 855 (1961) (search and seiaure; "quantum of proof * * * not that required on a trial of the issue of guilt or innocence").

In the case before us, the precise weight of the government's burden may affect the decision on the motion to suppress. We are, therefore, compelled to address the question with some attention. The matter presents inherent practical and theoretical difficulties.

The problem will, perhaps, be more clearly exposed by considering a number of simple hypothetical situations. (The terminology used generally follows Michael and Adler, The Trial of an Issue of Fact, 34 Colum. L. Rev. 1224, 1252 (1934) and Michael and Adler, The Nature of Judicial Proof (1931). See also, e.g., Ball, The Moment of Truth: Probability Theory and Standards of Proof, 14 Vand. L. Rev. 807 (1961); James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689 (1941)).

[4] In a civil case involving a breach of contract where defendant claims that he did not execute the agreement, the court will admit the alleged written contract if a reasonable man might find that it was signed by or on behalf of the defendant. Admissibility depends purely on the document's meeting minimum standards of probative force. There may be mixed questions of law and fact relating to "execution" turning on whether, for example, the document was forged

or whether the defendant was tricked into signing it. In determining whether the material proposition—the defendant "entered" into the contract—has been established, the jury will consider all of the admitted evidence, including the document before it. If there is some doubt about whether the defendant's signature was forged, or whether he had authorized an agent to execute it, the jury will consider this doubt in evaluating all the lines of proof bearing on the material proposition.

The level of burden of proof (persuasion) with respect to the material proposition will be, since this is an ordinary civil case, a preponderance—that is to say the trier must be convinced, on the basis of his evaluation of the evidence, that the proposition is more probably true than false (50+% probable for purposes of this analysis). Thus, if the trier would have been just convinced that the material proposition was probably true absent this doubt about the authenticity of the document, doubt about this line of proof might sufficiently reduce his evaluation of the probability of the material proposition so that he might find that it was not proven (50% or less probable).

The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence introduced (and often of that reasonably expected which was not produced). In giving appropriate, if sometimes unreflective, weight to a specific piece of evidence the trier will fit it into a shifting mosaic. If the trier concludes that one item of evidence is reliable, this may affect his evaluation of the credibility of a witness who gives testimony inconsistent with this evidence. His evaluation of the credibility of this witness may, in turn, affect his conclusion as to the probative force of the witness' testimony with respect to another line of proof. But confirming evidence of that other line of proof may require a reevaulation of the witness' credibility

and a complex readjustment of the assessment of all the interlocking evidence.

[5] Since so much of the evaluation of evidence depends upon varying hypotheses applied by triers with different backgrounds and views of life, fact finding differences among jurors and between judge and jury are to be expected. The court's function is, in the usual simple case, only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted. If it may affect that evaluation it is relevant and, subject to certain other rules, admissible. See Trautman, Logical or Legal Relevancy—A Conflict of Theory, 5 Vand. L. Rev. 385, 390 (1951). Even, therefore, if a juror decides that the probability is only 40% that the document referred to above is authentic, it may help him determine whether the material proposition is more probably true than not. This difference between the probabilities required of a material proposition and of relevant evidence and individual lines of proof partly explains why, in criminal cases, some courts have said that while the burden of proof of an element of the crime is beyond a reasonable doubt, individual items of evidence need not be proved by so high a standard. United States v. Valenti, 143 F.2d 362, 364 (2d Cir. 1943); People v. Klinkenberg, 90 Cal. App.2d 608, 204 P.2d 47, 62 (1948); 9 Wigmore, Evidence, § 2497, p. 324 (3d ed. 1940).

It is apparent, then, that the judge's function in determining admissibility in a case such as is hypothesized above is relatively simple. 9 Wigmore, Evidence § 2550 (3d ed. 1940); Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Some Problems of Proof Under the Anglo-American System of Litigation, 86-105 (1956); Note, 59 Harv. L. Rev. 488-491 (1964); California Law Revision Commission, Recommendation Proposing an Evidence Code, 56-70 (1965). He need not be concerned unduly about mistakenly admitting evidence because, if the document lacks

probative force, the jury can (absent factors such as prejudice) be counted on to ignore it. Only time has been lost by admitting evidence with probative force so low that it cannot affect the outcome.

Where admissibility of evidence depends upon extrinsic policies rather than upon probative force, the problem is more complex and the pressure on the trial judge is greater. Let us suppose, solely for the sake of analysis, that the burden on the government is to prove by a preponderance that a proferred document with high probative force was not obtained in violation of the law. Assume that exclusion depends upon an extrinsic policy designed to protect constitutional rights and to discourage obtaining evidence illegally. Suppose that the only material proposition in the case is whether defendant had certain knowledge (as that the powder he possessed was a narcotic). Let us suppose that the only evidence on the point is a letter from the defendant and that it would permit a jury to find beyond a reasonable doubt (95+% probable, for the purposes of this analysis) that he did have knowledge.

Now, if we suppose that the judge has decided that there is a question about whether the document was illegally obtained but that there is a bare preponderance (50+% probable) in favor of the government's contention that it was legally obtained, the judge will, on the assumptions made, admit it. The question of whether the document was or was not illegally obtained is not considered by the jury and normally it will not have before it evidence bearing on this question. Thus, the jury will give the document its full probative weight and it will find the defendant guilty beyond a reasonable doubt.

Whether such a result in a criminal case is proper depends upon how the rule of law is stated. If it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by evidence properly admitted in the trial*" the verdict should stand. The trier might have concluded that the probability of knowledge was 95+% if he assessed the

document solely on the basis of its probative force.' However, if it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by legally obtained evidence*," there is doubt about the validity of the conviction. If the probative force is discounted by the probabilities relating to the illegality, then the total probative force of all the relevant evidence might well have fallen below 95+%. The documentary line of proof would not then have a force of 95+% probability but of (95+ x 50+) %, or somewhere in the order of 50+%. order of 50+%. See Ball, The Trial Court: Probability Theory and Jury Issues, in Communication Sciences and Law: Reflections from the Jurimetrics Conference, 189-90 (Allen and Caldwell, eds., 1965).

This attenuation of probabilities results from the fact that, where variables are independent and the probability of a combination of variables is to be determined, the probability of each variable is multiplied by the probability of each other variable. See, e.g., Hoel, Elementary Statistics, 56-63 (1966); Keynes, A Treatise on Probability, 121, 135-136 (1952). Probative force and illegality are sufficiently independent to justify multiplying them for the purposes of this analysis. Where the probability of one of two variables approaches 100% the product will, of course, approximate the probability of the less probable variable.

[6] Dicta of the Supreme Court, while not decisive, suggest that the rule of law is that a defendant must be proved guilty beyond a reasonable doubt by legally obtained evidence. See, e.g., Lynumn v. State of Illinois, 372 U.S. 528, 537, 83 S.Ct. 917, 9 L.Ed.2d 922 (1963); Payne v. State of Arkansas, 356 U.S. 560, 568, 78 S.Ct. 844, 2 L.Ed. 2d 975 (1958); cf., Mesarosh v. United States, 352 U.S. 1, 9, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956). For example, in Payne v. State of Arkansas, 356 U.S. 560, 568, 78 S.Ct. 844, 850, 2 L.Ed.2d 975 (1958), the Court noted that it:

> "has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the

> admission in evidence * * * of the coerced confession vitiates the judgment * * *."

Cf. Fahy v. State of Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963) (search and seizure; "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). Since even the slightest possibility that illegally obtained evidence was used vitiates a conviction, a very effective procedural screen must be interposed.

Most of the cases dealing with burdens of proof on admissibility have been confession cases and the issue has been unconstitutional "coercion." But it is hard to see why the issue of whether the police "coerced" a confession in violation of the constitution should be treated, for procedural purposes, any differently from that of whether they obtained evidence "as a result of" illegal electronic surveillance. Both words—"coercion" and "result"—have factual and legal content and a finding with respect to the fact component in each presents similar problems to the judge.

Any evidence which is illegally obtained may be damning, so that the decision cannot turn on the importance of a confession in a case. Frequently, having lost on a motion to suppress, the defendant's chance of avoiding conviction is hopeless. A "confession" may contain exculpatory material, be incomplete, or be unreliable so that it is no more the equivalent of a plea of guilty than is key evidence illegally obtained. Certainly the burden of proof at a preliminary hearing should not depend upon how critical the evidence sought to be suppressed may be at the trial. The judge is often unable to accurately predict at that stage whether a particular item of evidence will clinch the prosecution's case.

The fact that exclusion in "coercion" cases was historically based upon lack of probative force (Maguire, Evidence of Guilt, 108-109 (1959)) while exclusion of other kinds of illegal evidence has been based upon purely extrinsic policies (People v. Cahan, 44 Cal. 2d 434, 439, 442, 445-

449, 282 P.2d 905, 907, 909-914 (1955); Maguire, Evidence of Guilt, 167-169 (1959)), does not justify a higher burden in a confession case. In fact, as we have already seen, the probative force argument may be available to the jury where a confession is introduced, while it may not be if evidence obtained by illegal searches or surveillance is used. Cf., as analogous to confession cases, United States v. Davis, 399 F.2d 948, 950, n. 1 (2d Cir. July 17, 1968), (voir dire on identification procedures followed by evidence before jury on reliability of identification in court). There is, therefore, some possibility that the jury will discount a confession which is in fact not voluntary but almost none that it will ignore evidence obtained by illegal electronic surveillance, wiretaps or searches. More, rather than less, protection therefore seems called for in cases such as the one before us.

It is extrinsic policy considerations rather than lack of probative force that now explain many confession exclusion rulings. See, e.g., Spano v. People of the State of New York, 360 U.S. 315, 320-321, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959); Jackson v. Denno, 378 U.S. 368, 386 n. 13, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The policies are essentially the same in search and seizure, wiretapping and electronics eaves dropping cases. See, e.g., American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, 114-115 (1968). In each instance an important constitutional right of the defendant is being protected and the policy of deterring future lawlessness by officials is being applied. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony." Mesarosh v. United States, 352 U.S. 1, 9, 77 S. Ct. 1, 5, 1 L. Ed. 2d 1 (1956).

[7] Confessions obtained as a result of violations of constitutional search and seizure requirements are, for that reason alone, inadmissible; "it matters not," Judge Fuld has properly instructed us, "that these 'fruits' happen to be

confessions rather than some other type of evidence." People v. Rodriguez, 11 N.Y.2d 279, 286, 229 N.Y.S.2d 353, 357, 183 N.E.2d 651, 654 (1962). It would make little sense if, as a result of a doubt about a single illegal search, the confession alleged to have been obtained were excluded and the seized real proof were admitted because the burdens were different. Simplicity and case in administration suggests the desirability of a single high standard in all suppression hearings. There is "no reasonable or logical basis for any distinction between inanimate (tangible) and animate (testimonial) evidence." People v. Dentine, 21 N.Y.2d 700, 703, 287 N.Y.S.2d 427, 429, 234 N.E.2d 462, 463 (1967) (Fuld, C.J. dissenting).

[8] A workable rule giving adequate consideration to the importance of the exclusionary policy is to require the government to prove beyond a reasonable doubt that the evidence it introduces was legally obtained. This is a familair standard in criminal cases. It is the one already utilized in some jurisdictions and adopted by the most recent appellate decision on the subject. See Pea v. United States, 397 F.2d 627 (D.C. Cir. 1968) and see cases cited at pp. 54, 55, supra.

Application of this standard, based on observations in this Court, would not affect the government adversely in any significant number of cases. Most of the problems with respect to illegally obtained evidence in the federal courts are of an interim nature arising in large part from a lack of clear guidelines available to federal law enforcement personnel rather than to undisciplined lawlessness. As the legal standards become clearer and the procedures for insuring compliance more routinized, motions to suppress because of illegally obtained evidence will become less important than they are today. As a practical matter, even today at hearings on motions to suppress, there is often no serious dispute about the facts (see, e.g., United States v. Feinberg, 383 F.2d 60, 70 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S. Ct. 788, 19 L. Ed. 2d 836 (1968))—what

Justice Frankfurter has referred to as "the crude historical facts, the external 'phenonumenological' occurrences and events." Culombe v. Connecticut, 367 U.S. 568, 603, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037 (1961). Where there remains a reasonable doubt about what happened and whether the government acted lawfully, the evidence should be excluded.

We need not now decide whether this rule ought to apply to factual issues such as consent in search and seizure cases. Cf. United States v. Dawson, 400 F.2d 194 (2d Cir. August 12, 1968). The government's conduct has concededly been illegal, the information and evidence bearing on the factual questions now before us are peculiarly within its ken, and an important federal policy of protecting citizens against this sort of intrusion on their privacy is at stake. It is fitting that the government bear the burden of proof and that it be a high one. See Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 647-48 (1968).

This decision with respect to burdens of proof in suppression cases is consistent with "the high standards which past decisions have insisted be maintained in the conduct of *federal criminal trials*." Lawn v. United States, 355 U.S. 339, 365, 78 S. Ct. 311, 326, 2 L. Ed. 2d 321 (1958) (concurring opinion) (emphasis supplied). Mesarosh v. United States, 352 U.S. 1, 3, 77 S. Ct. 1, 2, 1 L. Ed. 2d 1 (1956) ("the decision herein passes only on the integrity of the criminal trial in the federal courts"). Whether the Constitution requires that the same rule be applied by the states is not a matter we need now consider. Cf. Chapman v. State of California, 386 U.S. 18, 43, n. 2, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

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APPENDIX C

Emanuel PEA, Jr., Appellant,
v.
UNITED STATES of America,
Appellee.
No. 20433.

United States Court of Appeals
District of Columbia Circuit.

Argued April 18, 1967.

Decided Dec. 20, 1967.

Reargued En Banc Jan. 17, 1968.

On Rehearing En Banc June 19, 1968.

* * * * *

Before BAZELON, Chief Judge, and DANAHER, BURGER, WRIGHT, McGOWAN, TAMM, LEVENTHAL and ROBINSON, Circuit Judges, sitting en banc.

LEVENTHAL, Circuit Judge:

On December 20, 1967, a division of this court found error in the District Court's determination (made at 1966 Jackson v. Denno[1] hearing held pursuant to the Supreme Court's mandate),[2] that appellant's confession was voluntary. The division went on to rule that "it cannot fairly be found beyond a reasonable doubt that the confession was voluntary * * * [and] if that is the appropriate standard * * * a new trial must be held without introducing the confession in evidence." En banc hearing was ordered by a majority of the active judges on their own motion to decide whether the reasonable doubt standard is the appropriate one.

[7] In Clifton v. United States, 125 U.S. App. D.C. 257, 371 F.2d 354 (1966), cert denied, 386 U.S. 995, 87 S.Ct.

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[1] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

[2] 378 U.S. 571, 84 S.Ct. 1 (1964).

1312, 18 L.Ed.2d 341 (1967), the court rejected the contention that in order to be admissible in evidence a confession must be found by the trial judge to be voluntary beyond a reasonable doubt. We overrule that pronouncement and, in the exercise of our supervisory power over the administration of federal criminal justice in the District of Columbia,[3] adopt the rule that a judicial determination that a confession is admissible cannot be made unless the judge is satisfied beyond a reasonable doubt that the confession was voluntary.[4]

[8] The reasons which support our adoption of this rule have been set forth elsewhere,[5] and it is unnecessary to dwell upon them. Normally, we recognize, courts are chary of imposing upon trial judges the burden of applying quantitative standards in determining whether proffered evidence is admissible. But there are some places in the law of evidence, outside the domain of confessions, where it has been thought appropriate that a trial judge should follow such an

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[3]Cf. McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943); Fisher v. United States, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382, 166 A.L.R. 1176 (1946); Tate v. United States, 123 U.S.App.D.C. 261, 359 F.2d 245 (1966).

[4]Whether this standard is also a constitutional requirement is now and may remain an academic question. Even a petition under 28 U.S.C. § 2255 could raise the question only by making a claim that prior to today's decision the judge admitted a confession in evidence notwithstanding his reasonable doubt of voluntariness. There may not be any such cases. Any such § 2255 petition would be referred to the trial judge who admitted the confession in evidence (unless deceased or unavailable) and he would be in a position to clarify the matter.

[5]*See* Clifton v. United States, 125 U.S. App.D.C. 257, 263, 371 F.2d 354, 360 (1966), cert. denied, 386 U.S. 995, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967) (concurring opinion); United States v. Inman, 352 F.2d 954 (4th Cir. 1965); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967). The concurring *Clifton* opinion was also based, in the alternative, on constitutional grounds, and so perhaps was *Inman*, but it is not necessary to resolve the constitutional question in this case. *See* note 4 *supra*.

approach.[6] Trial judges have certainly been required by a number of courts to determine voluntariness of a confession beyond a reasonable doubt[7] as a necessary aspect of determining admissibility in evidence. We concur in that rule as a sound implementation of the public interest in preventing involuntary confessions from playing any part in a jury's determination of guilt.[8]

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[6]*E. g.*, Newton v. Richmond, 198 Va. 869, 96 S.E.2d 775 (1957) (blood test evidence in drunk driving prosecution); Hardeman v. State, 216 Miss. 115, 61 So.2d 797, 802 (1953) (dying declaration); Tucker v. State, Nev., 412 P.2d 970 (1966) (evidence of prior crime); *see generally* State v. Yough, *supra* note 5 and materials cited therein.

[7]Mullins v. United States, 382 F.2d 258 (4th Cir. 1967), reaffirming United States v. Inman, 352 F.2d 954 (4th Cir. 1965); Fernandez v. Beto, 3 Cr.L.Rep. 2005 (U.S.Dist.Ct., N.D.Tex. March 6, 1968); State v. Ragsdale, 249 La. 420, 187 So.2d 427 (1966), cert. denied, 385 U.S. 1029, 87 S.Ct. 758, 17 L.Ed.2d 676 (1967); State v. Keiser, 274 Minn. 265, 143 N.W.2d 75 (1966); Lee v. State, 236 Miss. 716 112 So.2d 254 (1959); State v. Longmore, 178 Neb. 509, 134 N.W.2d 66 (1965); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967); People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965); State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965), cert. denied, 384 U.S. 1017, 86 S.Ct. 1941, 16 L.Ed.2d 1039 (1966). See also United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968); Williams v. Beto, 386 F.2d 16 (5th Cir. 1967). In *Feinberg*, the court upheld a finding of voluntariness when there was no "credible possibility that his written statement * * * had been unconstitutionally coerced," language denoting compliance with a reasonable doubt standard. 383 F.2d at 70. The court took occasion to detail the procedure prescribed by *Inman*, including the reasonable doubt standard, and to note that this was essentially the same as the New York procedure, without even hinting that it found the reasonable doubt standard questionable. 383 F.2d at 70 n. 10. In *Williams*, the court also referred with favor to the New York procedure including the requirement that the confession must be found voluntary by the court beyond a reasonable doubt. 386 F.2d at 18 n. 2.

[8]Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (U.S. May 20, 1968); Pinto v. Pierce, 389 U.S. 31, 88 S.Ct. 192, 19 L.Ed.2d 31 (1967) (per curiam); Sims v. State of Georgia, 385 U.S. 538, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967); Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Appellant's case is here on direct appeal. The judgment is reversed and remanded with the instruction that appellant's confession not be admitted in a new trial.

So ordered.

BURGER, Circuit Judge, with whom DANAHER, and TAMM, Circuit Judges join, dissenting:

I dissent for the reason stated in my opinion in Clifton v. United States, 125 U.S.App.D.C. 257, 371 F.2d 354 (1966), cert. denied, 386 U.S. 995, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967), which, notwithstanding Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the majority now overrides with respect to the standard of proof governing the trial judge's preliminary determination of voluntariness of a confession. There is no need to go beyond anything that was said in *Clifton* except to offer some general observations.

First, *Jackson* does no more than call for a procedure that will insure a "*reliable* determination on the voluntariness issue * * *." *Id.* 378 U.S. at 387, 84 S.Ct. at 1786 (emphasis added). The Court stopped there in the face of Mr. Justice Black's astringent dissent to the effect that the court failed to define the burden of proof by which the trial judge must initially determine voluntariness out of the jury's presence. *Id.* at 404–405, 84 S.Ct. 1774. Thus neither in *Jackson* nor in more recent confession cases has the Supreme Court made any effort to spell out a standard as absolute as the one now adopted. One might well consider that the Supreme Court *sub silentio* decided *against* adopting the reasonable doubt standard by its own refusal to come to grips with the problem. Yet this court now—without waiting for a body of experience to develop under *Jackson*—elects to rush into an area the Supreme Court only four years ago deliberately avoided. It could have done this only because it was not prepared to prescribed a standard for admissibility of evidence which is barren of support in either logic or experience and for which there is not even a hint of demonstrated need.

It is indeed a remarkable anomaly in the law that a trial judge, in passing on the *admissibility* of a piece of evidence, do so by any particular quantitative standard. Why is it not sufficient that the trial judge be convinced that jurors could reasonably conclude the confession voluntary beyond a reasonable doubt? The jurors, not the judge, are the ultimate triers under our system. This is an elementary rule on the admissibility of an infinite variety of evidence and has been so for centuries.[1]

No other federal appellate court, with the single exception of one,[2] has imposed the reasonable doubt standard in this context. All others have either avoided the problem entirely,[3] or established some qualitative standard consistent with sound judicial experience and far less stringent than what we now adopt.[4]

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[1] It is true, as the majority points out in note 6, that there are some rare instances where a quantitative standard has been imposed in passing on admissibility, such as dying declarations, but I suggest these cases do not reflect a majority rule, as was pointed out in State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967). Moreover, I suggest that the majority say just how many "dying declarations" cases this court has had in the last one hundred years. To rely on that gossamer strand to support a rule of law is a confession of the utter bankruptcy of the concept the majority now adopts.

[2] Mullins v. United States, 382 F.2d 258 (4th Cir. 1967); United States v. Inman, 352 F.2d 954 (4th Cir. 1965).

[3] Kristiansand v. United States, 384 F.2d 301 (5th Cir. 1967); United States v. Taylor, 374 F.2d 753 (7th Cir. 1967) (citing *Inman*, however); Wakaksan v. United States, 367 F.2d 639 (8th Cir. 1966), cert. denied, 386 U.S. 994, 87 S.Ct. 1312, 18 L.Ed.2d 341 (1967). The opinions in these cases, however, do not suggest whether the issue was raised or briefed.

[4] United States v. Feinberg, 383 F.2d 60, 70 (2d Cir. 1967), cert. denied, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968) (independent judicial determination); Fisher v. United States, 382 F.2d 31, 34 (5th Cir. 1967) ("clear cut determination" on the record); Moser v. United States, 381 F.2d 363 (9th Cir. 1967), cert. denied, 389 U.S. 1054, 88 S.Ct. 802, 19 L.Ed.2d 850 (1968); Evans v. United States, 375 F.2d 355, 360 (8th Cir. 1967) ("unmistakable clarity"). In *Fein-*

The use of our supervisory powers to impose this unique and unwarranted burden of proof is a misconception of the purposes of our supervisory powers. As we noted in *Clifton*

> [i]n the future trial judges will be evaluating only those utterances of an accused which have already passed through the whole gamut of screening processes outlined in *McNabb*, *Mallory*, *Escobedo*, *Massiah*, and *Miranda*. The prospects now are that trial judges, otherwise much overburdened, will not be overworked in passing on the voluntariness of the few confessions which will survive the application of these cases.

125 U.S.App.D.C. at 263, 371 F.2d at 360. Our extraordinary supervisory powers should be exercised only for overriding need, and in such cases we should not be concerned too much if we find we must break with tradition. But here, with the number of usable confessions dwindling to the vanishing point, the need is not present, let alone overriding. But in those few remaining cases to which it will apply, the consequences will be to make convictions of the obviously guilty yet more difficult to secure even when the accused has fully described the details of his criminal act in a confession which is capable of satisfying twelve jurors, beyond reasonable doubt, as to voluntariness. We now hold that one judge must usurp the historic role of the twelve jurors.

This case is but another manifestation in this court of a tendency—happily not widespread in appellate courts—to follow the Jerome Frank syndrome—a school of thought which profoundly mistrusts juries,[5] and prefers fact finding by one judge whose conclusions can more readily be upset by appellate judges.

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berg and Williams v. Beto, 386 F.2d 16, 18 n. 2 (5th Cir. 1967), the court did refer to the New York procedure in which the trial judge makes a preliminary determination of voluntariness using the reasonable doubt standard.

[5] J. FRANK, COURTS ON TRIAL 108-145 (1949).

Since the Constitutional mandate for twelve jurors is explicit and cannot be directly evaded, this mistrust manifests itself in gradually chipping away at the jury function, requiring constantly increasing arrays of special instructions to fence in their discretion and multiple pretrial processes to restrict what jurors can safely be allowed to see and hear.

I think it is fair to say, again, that this is probably in part, at least, what Mr. Justice Black must have had in mind when in *Jackson* he pointedly said:

> Finally, and even more important, the Court's new constitutional doctrine [Jackson v. Denno] is, it seems to me, a strange one when we consider that both the United States Constitution and the New York Constitution (Art. 1, § 2) establish trial by jury of criminal charges as a bedrock safeguard of the people's liberties. The reasons given by the Court for this downgrading of trial by jury appear to me to challenge the soundness of the Founders' great faith in jury trials. Implicit in these constitutional requirements of jury trial is a belief that juries can be trusted to decide factual issues. Stating the obvious fact that "it is only a *reliable* determination on the voluntariness issue which satisfies the constitutional rights of the defendant * * *," *ante*, p. 1786 (emphasis supplied), the Court concludes, however, that a jury's finding on this question is tainted by inherent unreliability. In making this judgment about the unreliability of juries, the Court, I believe, *overlooks* the fact that the Constitution itself long ago made the decision that juries *are* to be trusted.

378 U.S. at 405, 84 S.Ct. at 1796 (Black, J., dissenting).

I consider that juries are to be trusted as much when they return verdicts of guilty as when they set an accused free. Jurors do not need judges to act *in loco parentis*.

APPENDIX D

Nathaniel CLIFTON, Appellant,

v.

UNITED STATES of America,

Appellee.

No. 19757.

United States Court of Appeals
District of Columbia Circuit.

Argued May 11, 1966.

Decided Nov. 15; 1966.

Certiorari Denied April 10, 1967.

See 87 S.Ct. 1312.

* * * * *

BURGER, Circuit Judge:

This appeal arises out of the holding of the Supreme Court in Jackson v. Denno, 378 U. S. 368, 84 S.Ct. 1774; 12 L.Ed. 2d 908 (1964).

[1-5] More than 20 years ago Appellant was tried and convicted on a charge of robbery.[1] No appeal was taken. In 1964 Appellant first attacked his 1946 conviction by a petition in the District Court, Clifton v. United States, Civil No. 2316-64, which was treated by the court as a petition for a writ of *coram nobis*.[2] That petition was denied. Follow-

[1]Crim. No. 76574, April 5, 1946.

[2]Since Appellant has already served his sentence under the 1946 conviction which he seeks to collaterally attack, the attack would ordinarily be moot, *e.g.*, Parker v. Ellis, 362 U.S. 574, 80 S.Ct. 909, 4 L.Ed. 2d 963 (1960). Moreover, since Appellant is currently serving a sentence under a New York state conviction, the normal vehicle for collateral attack, 28 U.S.C. §2255 (1964), in unavailable, Helfin v. United States, 358 U.S. 415, 418, 79 S.Ct. 451, 3 L.Ed. 2d 407 (1959); Farnsworth v. United States, 91 U.S.App.D.C. 121, 198 F.2d 600 (1952), cert. denied, 344 U.S. 915; 73 S.Ct. 338, 97 L.Ed. 706 (1953). However, his 1946 conviction was relied upon in New York where he

ing Jackson v. Denno, *supra*, a second petition was filed in 1965. In this second petition from which the instant appeal is taken Appellant rests on the single ground that the District Court in the 1946 trial had not afforded him an independent hearing such as is now required to pass on the voluntariness of the confession which was admitted in evidence against him.[3]

Search for the stenographic verbatim record of the 1946 trial was unavailing but the District Judge who presided at that trial heard Appellant's petition and relied on detailed personal longhand notes of the trial which he had preserved. On the basis of these notes the District Judge made findings that he had in fact conducted an independent hearing on the issue of voluntariness of the confession and "found on the basis of the evidence that the confession was voluntary * * * and admitted the confession." Accordingly, the District

was sentenced under a multiple offender statute. It is claimed that he will not be subject to a lawful sentence as a multiple offender if the 1946 judgment of conviction in this jurisdiction cannot stand. Where a practical effect on a present sentence may result from a successful attack on a conviction and sentence already served, the proper remedy is a writ in the nature of *coram nobis*, United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. (1954). Both the District Court and the Government assume that a petition for a writ in the nature of *coram nobis* is the proper remedy in this case.

[3] Appellant has made two other contentions for the first time on appeal. One allegation is that the confession evidence was obtained in violation of Federal Rule of Criminal Procedure 5(a). Such claims are not cognizable in a *coram nobis* proceeding, *e.g.*, Moon v. United States, 106 U.S.App.D.C. 301, 303, 272 F.2d 530, 532 (1959); *cf.* Thornton v. United States, 125 U.S.App.D.C. ____, 368 F.2d 822 (1966); Plummer v. United States, 104 U.S.App.D.C. 211, 212, 260 F. 2d 729, 730 (1958). Appellant's other argument is that his confession was obtained in violation of the rule articulated in Escobedo v. State of Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964). In addition to the fact that this was not raised in the District Court and is untimely, the Supreme Court has recently ruled that *Escobedo* need not be given retroactive effect. Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966).

Judge denied the contemporaneous petition, United States v. Clifton, 239 F. Supp. 49, 51 (D.D.C. 1965).[4]

The question to be resolved is whether the procedures applied in the 1946 trial and the instructions to the jury were "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession * * *," Jackson v. Denno, *supra*, 378 U.S. at 391, 84 S.Ct. at 1788.

The Government's position is that the District Judge who tried the case in 1946 made findings on the basis of his 1946 longhand notes, that he conducted an independent hearing on voluntariness out of the presence of the jury before deciding to submit that issue to the jury, and that this procedure, generally conforming to the so-called Massachusetts procedure approved in *Jackson*, fully satisfied the requirements of *Jackson*.

[6] Appellant contends that the Court in *Jackson* expressed doubts as to the procedure in this jurisdiction.[5] He

[4]The Government concedes the retroactive application of *Jackson*. We also note that *Jackson* has been listed by the Supreme Court itself as one of the new constitutional rules to be applied retroactively, Johnson v. State of New Jersey, 384 U.S. 719, 726-729, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966); Linkletter v. Walker, 381 U.S. 618, 628-629 n. 13, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965). The Court has also remanded cases concluded prior to *Jackson* for proceedings consistent therewith, indicating retroactive application. See Boles v. Stevenson, 379 U.S. 43, 85 S.Ct. 174, 13 L.Ed. 2d 109 (1964); McNerlin v. Denno, 378 U.S. 575, 84 S.Ct. 1933, 12 L.Ed. 2d 1041 (1964). See also Com. ex rel. Butler v. Rundle, 416 Pa. 321, 326, 206 A.2d 283, 286 (1965) ("the most persuasive authority for the proposition that the principle of Jackson v. Denno is to be applied to convictions finalized prior to the date of that decision in *Jackson* itself").

[5]The Court's Appendix to *Jackson* referred to the procedure in the District of Columbia as follows:

> The Court of Appeals for the District of Columbia, however, does seem to sanction a variation of the New York practice with the requirement that the judge hold a full preliminary hearing, at which the defendant may testify, outside the presence of the jury. It is not clear what the trial judge must find before admitting the issue of voluntariness to the jury. Sawyer

thus argues that "by stating that he [the District Judge] followed the 'traditional practice' in this district, the court * * * has virtually conceded that the procedures utilized in determining the voluntariness of appellant's confession do not meet the constitutional criteria laid down in *Jackson*." We do not agree. Doubts as to past practice do not necessarily mean that the requirements of *Jackson* were not met in Appellant's case. See Mitchell v. Stephens, 353 F.2d 129, 142 (8th Cir. 1965).

The critical issue raised by Appellant is that "the decision in Jackson v. Denno * * * requires that the trial judge, in addition to holding a preliminary hearing out of the presence of the jury, make a specific finding that the confession was voluntary beyond a reasonable doubt." Appellant also contends that the District Court did not instruct the jury that it was required to find the confession voluntary beyond a reasonable doubt in order to rely on it. The fact is that the Supreme Court did not pass on either of these questions in *Jackson*.

[7] Jackson v. Denno requires only that the procedures applied in these circumstances must be "fully adequate to

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v. United States, 112 U.S.App.D.C. 381, 303 F.2d 392; Wright v. United States, 102 U.S.App.D.C. 36, 250 F.2d 4 (where the confession could be found voluntary, the issue is for the jury). 378 U.S. at 400, 84 S.Ct. at 1793. On the same day the Court vacated and remanded two cases from this jurisdiction, Pea v. United States, 116 U.S.App.D.C. 410, 324 F.2d 442 (1963) and Muschette v. United States, 116 U.S.App.D.C. 239, 322 F.2d 989 (1963) for proceedings in conformity with *Jackson*, 378 U.S. at 569 and 571, 84 S.Ct. at 1927 and 1929, 12 L.Ed. 2d 1039 and 1040.

Since that time we have had numerous occasions to interpret the practice in this jurisdiction in light of *Jackson's* requirements and to resolve the doubts expressed therein. See Hutcherson v. United States, 112 U.S.App.D.C. 51, 351 F.2d 748 (1965); Green v. United States, 122 U.S.App.D.C. 33, 351 F.2d 198 (1965); Butler v. United States, 122 U.S.App.D.C. 5, 350 F.2d 788 (1965); Curtis v. United States, 121 U.S.App.D.C. 283, 349 F.2d 718 (1965); Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965).

insure a reliable and clear-cut determination of the voluntariness of the confession," 378 U.S. at 391, 84 S.Ct. at 1788; it made no attempt to define the standard to be applied by the trial judge in his preliminary determination of voluntariness,[6] and the Court expressly disclaimed any ruling on jury instructions concerning the consideration of voluntariness, 378 U.S. at 375 n. 5, 84 S.Ct. at 1779.

In his charge to the jury in the 1946 trial, the District Judge did not specifically single out the confession, apart from the other evidence, and define the standard applicable to it. We note, however, that the confession was in fact the essence of the Government's case. The Judge instructed the jury that the Government had the burden of proving beyond a reasonable doubt that the defendant was guilty and had committed every element of the offense charged. It does not seem possible to us that the jury would have failed to understand that in order to convict they must believe beyond a reasonable doubt both its voluntariness and its substance, *i.e.*, the truth of the facts recited in the confession.

[8] The District Judge, however, did not in 1946 or in the hearing from which this appeal is taken, spell out by what standard *he* evaluated the confession before submitting it to the jury. We are not unmindful that the Fourth Circuit has held that the District Judge must find the confession voluntary beyond a reasonable doubt when making his preliminary determination. United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965).[7] The opinion of that court contains no

[6] In the subsequent case of Boles v. Stevenson, 379 U.S. 43, S.Ct. 174, 13 L.Ed. 2d 109 (1964), the Court again did not articulate a standard other than to repeat the language of *Jackson* that a "reliable and clear-cut determination of the voluntariness of the confession" is required.. 379 U.S. at 45, 85 S.Ct. at 176. See also Kinder v. Boles, 253 F.Supp. 817, 823 (N.D.W.Va.1966).

[7] See also State v. Ragsdale, 249 La. 420, 187 So.2d 427 (1966); People v. Huntley, 15 N.Y. 2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 (1965); State v. Brewton, 238 Or. 590, 605, 395 P.2d 874, 881 (1965) (concurring opinion of O'Connell, J.). More recently courts which follow the orthodox view in which only the trial judge passes on

extended discussion or treatment of the vexing problem left unresolved by *Jackson*. The determination of whether a confession is voluntary is, in substance, a ruling on its admissibility as evidence. State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 249, 133 N.W. 2d 753, 762 (1965), cert. denied, 384 U.S. 1017, 86 S.Ct. 1941, 16 L.Ed. 2d 1039 (1966); State v. Keller, 240 Or. 442, 448, 402 P.2d 521, 525 (1965). Nowhere in the law—civil or criminal—has it ever been thought that a trial judge, in passing on admissibility of evidence in a jury case, must use the reasonable doubt standard.[8] The Supreme Court in *Jackson* pointedly failed to make any comment on this crucial issue, as Mr. Justice Black sharply noted in his dissenting opinion, 378 U.S. at 404-405, 84 S.Ct. at 1795-1796.

[9] It is one thing to call for this high standard of proof from the ultimate fact finders and quite another to ask that this issue be resolved preliminarily by the judge beyond a reasonable doubt contrary to all the law governing admissi-

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the voluntariness of the confession have opted for the reasonable doubt standard, *e.g.*, State v. Keiser, 274 Minn. 265, 143 N.W. 2d 75 (1966). These latter cases are the natural result of the rule that the trier of facts find guilt beyond a reasonable doubt. Under the orthodox view only the trial judge passes on the question of voluntariness of the confession. Under our procedure the trial judge and, if he finds the confession voluntary, the jury are permitted to do so, and since the jury is bound by the reasonable doubt standard, the logic of those cases requiring the trial judge to use the same standard at his preliminary determination is not compelling.

[8] *E.g.*, Carlo v. United States, 286 F.2d 841, 848 (2d Cir. 1961) (quantum of proof to be adduced on a summary proceeding to suppress evidence is not that required on trial of the issue of guilt or innocence); *cf.* Brinegar v. United States, 338 U.S. 160, 172-173, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (no requirement that proof sufficient to establish guilt is required to substantiate existence of probable cause); Connecticut Mutual Life Ins. Co. v. Hillmon, 188 U.S. 208, 217, 23 S.Ct. 294, 47 L.Ed. 446 (1903) (judge should require prima facie proof only of existence of common design for admission of declaration of one party to alleged conspiracy); Shafer v. State, 214 Tenn. 416, 381 S.W. 2d 254 (1964) (procedure for confessions is the same as in passing on admissibility of a search and seizure claim).

bility of evidence. We think Mr. Justice Black was correct in suggesting that to vest this essentially fact finding function in the judge would constitute a "downgrading of trial by jury," 378 U.S. at 405, 84 S.Ct. at 1796 (dissenting opinion). We are not persuaded that it is more logical or reasonable that a confession, alone among all the myriad of evidentiary material, be singled out for a unique standard of appraisal. It would be difficult to distinguish, so far as jury impact is concerned, the weight of a confession from other forms of damaging utterance—inconsistent statements and admissions, for example, heard by persons other than the police. *Cf.* Ashcraft v. State of Tennessee, 327 U.S. 274, 66 S.Ct. 544, 90 L.Ed. 667 (1946).[9] Under the Massachusetts procedure we see no basis for a special and unique "admissibility" standard which places the judge in the temporary role of a "juror," denigrating the historic fact finding role of jurors.

The concurring opinion views Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897), as the source of the strict "reasonable doubt" standard for trial judges in the preliminary determination of voluntariness required under *Jackson* for the so-called Massachusetts procedure. The pertinent language in *Bram* is as follows:

> The rule is * * * that, in order to render a statement admissible, the proof must be * * * sufficient to establish that the making of the statement was voluntary * * * , 168 U.S. at 549, 18 S.Ct. at 189.

* * * * *

[9] Indeed, the evidence of an eye witness is likely to be at least as damaging as a confession; but no one has suggested that a trial Judge must be satisfied beyond a reasonable doubt that the eye witness is truthful or that his testimony is voluntary. Resolution of the weight of such evidence is left for the jury.

It should also be noted that, in ruling on the admissibility of such highly incriminating evidence as a "bloody shirt" found in the possession of the accused, no test, qualitative or otherwise need be applied by the judge.

> Any doubt as to whether the confession was voluntary must be determined in favor of the accused * * *, 168 U.S. at 565, 18 S.Ct. at 195.

Judge Leventhal concedes that the most that can be said said for the "any doubt" language of *Bram* is that it was a "quantum of proof" reference, used in a quantitative sense. *Bram* does not establish a standard which marks off on a qualitative scale the degree of certainty which a trial judge must employ before letting the jury evaluate both voluntariness and accuracy of a confession.[10]

The only alternative interpretation of *Bram* is to say that "any doubt" as used there means that the slightest scintilla of qualitative doubt regarding voluntariness would require the trial judge to ban the confession from any jury determination of voluntariness under its obviously lesser "reasonable doubt" standard. This would go far beyond imposing a mere "reasonable doubt" standard on trial judges in their preliminary determination of voluntariness. Thus, if we are to read *Bram* literally we must conclude that it calls for an absolute "any doubt" qualitative standard, and no reason appears why this should re reduced arbitrarily to a "reasonable doubt" standard. The language in *Bram* is simply "any doubt" not "any reasonable doubt." This analysis seems clearly apparent from the very wording of the questioned sentence in the *Bram* opinion. That Court was simply saying that *doubt* must be determined in favor of the accused regarding voluntariness

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[10]Harrold v. Territory of Oklahoma, 169 F. 47 (8th Cir. 1909), is cited as clarifying the language of *Bram* to mean "beyond a reasonable doubt," *id.* at 53-54. However, Judge Walter Sanborn clearly stated that in that circuit at that time it was solely the function of the trial judge to pass upon the question of voluntariness:

> It was not the province of the jury to consider or determine that issue. It was the duty of the court alone to hear and decide it.

169 F. at 53. Assuredly, the ultimate trier of facts must be bound by a reasonable doubt standard. See note 7 *supra*.

of confessions.[11] It was not addressing itself to framing a standard.

Additionally some mention should be made of a troublesome contradiction in the position that it is from *Bram* that we draw the "reasonable doubt" standard to be utilized by the trial judge in his preliminary determination but that *Jackson's* requirement of voluntariness hearings by the trial judge need not be retroactively applied to govern cases where some pre-admission voluntariness hearing was in fact held. It is reasoned that the required standard, "beyond a reasonable doubt," is an *old* one, established by *Bram;* but its expression is considered to be *new* since *Jackson,* with respect to whether this standard should have retroactive application. Under the concurring interpretation, *Jackson* is retroactive only in its requirement for a preliminary determination of voluntariness by the trial judge. *Jackson,* it is reasoned, need not be retroactively applied when some judicial screening did take place, although imposing a less restricted standard of of doubtfulness. Yet it is this very standard which Judge Leventhal claims was established long ago by *Bram.* For these reasons we are unable to accept the concurring interpretation of *Bram* and *Jackson* with respect to the issue now before us.

[10-12] We repeat again that *Jackson* does no more than call for a procedure that will give a "reliable determination on the voluntariness issue * * *," 378 U.S. at 387, 84 S.Ct. at 1786; we reject the argument that a United States District Judge cannot make that "reliable determination" on conven-

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[11] Judge Leventhal finds further significance in the fact that *Bram* has been revitalized in *Escobedo*; *Malloy,* and *Miranda.* Yet *Bram* was never once cited in *Jackson,* where its relevance on the present issue resides, if it has relevance. *Jackson* expressly overruled Stein v. People of State of New York, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522 (1953). *Stein* had thoroughly discredited *Bram, id.* at 190-191 n. 34, 73 S.Ct. at 1095 (*Bram* "is not a rock on which to build constitutional doctrine."). If Judge Leventhal's interpretation of *Bram* is correct, certainly the Court in *Jackson,* well aware that it was overruling *Stein,* would have taken notice of that interpretation of *Bram,* and answered the very questions presented before us today.

tional admissibility criteria, leaving any resolution of reasonable doubt as to that evidence in its traditional province—the combined judgment of twelve jurors. We hold that the confession should not be admitted in evidence unless the trial judge makes a preliminary determination and an express finding that on all the evidence he is satisfied that the confession was voluntarily made.[12] We note that Judge Leventhal's opinion sees little difference between a standard that the District Judge be "satisfied" of voluntariness and that he be persuaded of that conclusion beyond a reasonable doubt. If the determination of the District Judge is to submit the confession to the jury, however, he should not indicate that he has made a preliminary decision that it was voluntarily made, but he should specifically instruct that they are not to give any weight to the confession unless *they*, as ultimate fact finders, are satisfied beyond a reasonable doubt on all the evidence that it was voluntarily given by the accused.

That a coordinate tribunal has reached a different conclusion, United States v. Inman, *supra*, has led us to ponder carefully on this problem. We are presented with one choice which seems to us to maintain the role of lay jurors in their historically high place and another which limits them to resolving only those fact issues which can be "safely" entrusted to their collective judgment. For a generation judicial trends have been to exclude from the jury all evidence thought to have been unfairly or improperly secured, and more recent hodlings place stringent limits on the use of any utterance by an accused. In the future trial judges will be evaluating only those utterances of an accused which have already passed through the whole gamut of screening processes outlined in *McNabb*, *Mallory*, *Escobedo*, *Massiah*, and *Miranda*. The prospects now are that trial judges, otherwise much overburdened, will not be

[12]Even an orthodox jurisdiction such as Illinois has specifically rejected the reasonable doubt standard, see People v. Golson, 32 Ill.2d 398, 207 N.E. 2d 68 (1965), cert. denied, 384 U.S. 1023, 86 S.Ct. 1951, 16 L.Ed. 2d 1026 (1966).

overworked in passing on the voluntariness of the few confessions which will survive the application of these cases. At the very least, it seems to us to be reasonable to continue functioning without departing from the traditional rule reaffirmed by this holding. The future experience of this and other circuits may indicate a different rule is desirable. Perhaps this is why the Supreme Court left these issues unresolved in the face of Mr. Justice Black's astringent comments—so that the ultimate solution could be based on experience rather than on prophecy.

The order of the District Court is,

Affirmed.

LEVENTHAL, Circuit Judge (concurring in result):

I have a different view from that of my brethren as to the rule appropriate in implementing Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), concerning the standard that properly governs the trial judge when making a determination as to the voluntariness of defendant's confession before permitting its presentation in evidence in a criminal case tried to a jury.

1. As to all cases tried subsequent to Jackson v. Denno, the standards and procedures that are applicable, in my view, are those stated in United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965), where Judge Bryan succinctly outlined the procedure prescribed for the district courts in our neighboring circuit:

> To assure the accused complete protection, the procedure should substantially be this. On proffer of the confession, even though there be no objection, the court should let the jury withdraw, and then take evidence upon the confession and its factual setting. On this voir dire the defendant may testify without prejudice to his privilege not to take the stand before the jury, but he may be examined or cross-examined only with regard to the origin and character of the confession, not upon his innocence or guilt. The court will thereupon inde-

pendently determine whether the confession is admissible.

In this determination the District Judge will evaluate the evidence to ascertain whether, after resolving any conflicts therein, it convinces him beyond a reasonable doubt that the confession was voluntary. Unless the judge is so persuaded, the confession may not be admitted. If, however, he is satisfied beyond a reasonable doubt of its voluntariness, he should explicitly make and include in the record a finding of that fact. [Emphasis added.]

* * * * *

Following the voir dire hearing, the trial will proceed with or without the confession, according to whether it was received or rejected. If admitted, the court should instruct the jury, whether requested or not, upon the law governing the use of a confession. Stevenson v. Boles, 331 F.2d 939 (4 Cir. 1964), aff'd per curiam, 379 U.S. 43, 85 S. Ct. 174, 13 L. Ed. 2d 109. Included would be a forthright caution that before giving any weight to the confession, the jury must be satisfied beyond a reasonable doubt that it had been made by the accused uninfluenced by promise of reward, threat of injury or diminution of his rights.

Applying a reasonable doubt standard would not be a strange or exotic task for a judge. Every time he tries a criminal case without a jury he must find all the elements of a crime established beyond a reasonable doubt. The determination by a judge of the voluntariness of a confession is so significant in the final assessment of guilt or innocence, and relates to such basic values in our system of jurisprudence, that it must be governed by the same standards as apply to the elements of the crime, and is not to be relegated to a lower plane on the ground that it is a mere ruling on a point of evidence.

We are not dealing with an ordinary ruling on evidence. The exclusion of confessions not shown to be voluntary inheres in the constitutional privilege against self-

incrimination. Bram v. United States, 168 U.S. 532, 542, 18 S. Ct. 183, 42 L. Ed. 568 (1897); Malloy v. Hogan, 378 U.S. 1, 6-7, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); Miranda v. State of Arizona, 384 U.S. 436, 461, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The historical root is the maxim *nemo tenetur seipsum accusare*, "no one shall be held to accuse himself." "[This] maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of constitutional enactment." Brown v. Walker, 161 U.S. 591, 596-597, 16 S. Ct. 644, 647, 40 L. Ed. 819 (1896), quoted in *Miranda*, supra, 384 U.S. at 442-443, 86 S. Ct. 1602.

In *Bram* Justice White, later the Chief Justice, explored the "quantum of proof" necessary to show the voluntariness of a confession. The current vitality of his approach is attested by the recent and extensive reliance on his opinion.[1] He expressly declared that in the court's determination whether to admit a confession "any doubt as to whether the confession was voluntary must be determined in favor of the accused." 168 U.S. at 565, 18 S. Ct. at 195. In Harrold v. Territory of Oklahoma, 169 F. 47, 53-54 (8th Cir. 1909), Judge Sanborn cited *Bram* and spelled out its requirement:

> The burden was upon the prosecutor to prove to the court that the confession was voluntary, that it was not influenced by compulsion, hope, fear, or other inducement of any sort, and, if the evidence failed to establish that fact beyond a reasonable doubt, it was the duty of the court to reject the confession.

Other decisions that applied the same rule are cited in the footnote.[2] This aspect of *Bram* was not applied in the Dis-

[1] In addition to *Miranda* and *Malloy*, noted in the text, see, *e.g.*, Escobedo v. State of Illinois, 378 U.S. 478, 485-486, 84 S.Ct. 1758, 12 L.Ed. 2d 977 (1964); Mapp v. Ohio, 367 U.S. 643, 656-657, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961).

[2] Commonwealth v. Mayhew, 297 Ky. 172, 178 S.W. 2d 928 (1943); State v. Wilson, 217 La. 470, 46 So. 2d 738 (1950), aff'd per curiam, 341 U.S. 901, 71 S.Ct. 611, 95 L.Ed. 1341 (1951).

trict of Columbia, where "voluntariness" was for determination by the jury under the reasonable doubt standard, and local "law and practice" contemplated submission of the confession to the jury without a finding of voluntariness by the court. Wright v. United States, 102 U.S. App. D.C. 36, 45, 250 F.2d 4, 13 (1957). Prior to Jackson v. Denno there was no ruling that the Constitution required a judicial determination of voluntariness.

That the court making the determination of voluntariness required of the court by Jackson v. Denno should be governed by the standard of being convinced beyond a reasonable doubt, and not by the analytically lower standard of proof to the "satisfaction of the court" which governs findings of fact involved in ordinary rulings on evidence, is attributable to the distinctive nature of the voluntariness determination. It has the deepest roots in our Constitution and system of jurisprudence. And it relates to a matter which is usually the key item in the proof of guilt, and certainly one of overpowering weight with the jury. The very introduction of an involuntary confession is a denial of constitutional rights so prejudicial as to vitiate the conviction irrespective of the quantum of other untainted evidence demonstrating the guilt of the accused.[3]

Plainly the jury must disregard a confession unless they find it voluntary beyond a reasonable doubt. That was recognized by both federal and state courts in both the pre-*Jackson* era[4] and in the post-*Jackson* cases wherein this

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[3]See, *e.g.*, Payne v. State of Arkansas, 356 U.S. 560, 567-568, 78 S.Ct. 844, 2 L.Ed. 2d 975 (1958); Blackburn v. State of Alabama, 361 U.S. 199, 210, 80 S.Ct. 274, 4 L.Ed. 2d 242 (1960); Rogers v. Richmond, 365 U.S. 534, 540-541, 81 S. Ct. 735, 5 L.Ed. 2d 760 (1961); Haynes v. State of Washington, 373 U.S. 503, 518-520, 83 St.Ct. 1336, 10 L.Ed. 2d 513 (1963).

[4]*E.g.*, Smith v. United States, 268 F.2d 416, 421 (9th Cir. 1959); Smith v. State, 189 Md. 596, 56 A.2d 818, 822 (1948); State v. Gidron, 211 S.C. 360, 45 S.E. 2d 587 (1947).

issue was re-submitted to the jury.[5]

In *Jackson* the Supreme Court held that procedures in the trial court must "be fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." 378 U.S. at 391, 84 S. Ct. at 1788. So important is the need for reliability that the basic and primary determination must be made by the court. This is not to derogate from the jury as such, but to recognize the prejudice inhering in the admixture of a determination of voluntariness together with the jury's inescapable consideration of reliability of the confession, and indeed ultimate guilt or innocence.

Certainly the need for a finding beyond a reasonable doubt must govern the judge operating under the orthodox, or Wigmore, rule, where the issue of voluntariness is not presented as such to the jury. And *Jackson* makes clear that the Supreme Court's approval of the Massachusetts rule rests on the premise that it provides as much protection as the orthodox rule in regard to the screening by the judge, which remains the basic determination safeguarding the accused even though the voluntariness is re-submitted to the jury. See 378 U.S. at 378 n. 8, 84 S. Ct. at 1781.

It is true that in Jackson v. Denno the Supreme Court did not expressly address itself to the question before us. But to me a reasonable doubt standard for the judge's determination of voluntariness ensues from the Court's reasoning as surely as Euclid's corollaries unfolded from his theorems. The decisive ruling in Jackson v. Denno is that

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[5]United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965); United States ex rel. Walden v. Pate, 350 F.2d 240, 243 (7th Cir. 1965), cert. denied, 384 U.S. 1018, 86 S.Ct. 1948, 16 L.Ed. 2d 1041 (1966); Whiteside v. United States, 346 F.2d 500, 506 n. 2 (8th Cir. 1965), cert. denied, 384 U.S. 1023, 86 S.Ct. 1946, 16 L.Ed. 2d 1025 (1966); Lopez v. State, 384 S.W. 2d 345, 348 (Tex.Crim.App. 1964), a companion case remanded on the same date as Jackson v. Denno, see 378 U.S. 567, 84 S.Ct. 1924, 12 L.Ed. 2d 1038 (1964).

it is the determination of voluntariness by the judge which is crucial to our constitutional liberties. Any redetermination by the jury may be "ultimate" in time but not in constitutional significance.

Practical considerations of proof underscrore the importance of the court's use of the reasonable-doubt standard, notwithstanding a later submission to the jury. There may be more evidence before the court than before the jury, for example the testimony of a defendant who dare not risk presentation of prior convictions to the jury. It would be unjust if such evidence raised a reasonable doubt only to find that this doubt was ignored by the judge, under the rule proclaimed by the majority, and was never available to the jury.

Finally attention should be called to the weight of the post-*Jackson* rulings that the judge must determine voluntariness of the confession beyond a reasonable doubt. States that applied this standard prior to *Jackson* have continued it.[6] Rulings to this effect appear not only in jurisdictions applying the orthodox rule,[7] but also in jurisdictions, like New York, which resubmit the issue of voluntariness to the jury.[8] The standard has been adopted even where the court expressly took into account that it was dealing with a rule of evidence.[9]

The view I hold is the result reached not only by the Fourth Circuit but also, so far as I am aware, by every

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[6]*E.g.*, State v. Ragsdale, 249 La. 420, 187 So.2d 427 (1966).

[7]State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965), cert. denied, 384 U.S. 1017, 86 S.Ct. 1941, 16 L.Ed. 2d 1039 (1966); State v. Keiser, 274 Minn. 265, 143 N.W. 2d 74, 79 (1966).

[8]United States v. Inman, 352 F.2d 954, 956 (4th Cir. 1965); State v. Longmore, 178 Neb. 509, 134 N.W. 2d 66 (1965); People v. Huntley, 15 N.Y. 2d 72, 255 N.Y. S.2d 838, 204 N.E. 2d 179 (1965).

[9]See State ex rel. Goodchild v. Burke, supra note 7, 133 N.W. 2d at 763.

other court that has analyzed *Jackson* in its opinion. And it is not without significance that the majority have not adduced any post-*Jackson* ruling discarding the reasonable doubt standard for the trial judge which they can champion as authoritative.[10]

2. Assuming, however, that the reasonable doubt standard for the judge is not a constitutional prerequisite in a jurisdiction where the issue is resubmitted to the jury, the reasonable doubt standard for the judge should be enunciated in the exercise of our responsibility to exercise supervisory powers over the administration of justice in the District of Columbia. *Cf.* Tate v. United States, 123 U.S. App. D.C. 261, 359 F.2d 245, 252 (1966), and cases cited. I see no reason for our rejection of a rule approved by the Supreme Court in *Bram* and recently adopted by both federal and state courts (see notes 7-9 *supra*) as an incident of Jackson v. Denno.

3. However, the requirement that a reasonable doubt standard govern the judge's determination of voluntariness should not, in my view, be applied retroactively to a conviction which became final some sixteen years before *Jackson* was decided.

Jackson v. Denno is plainly retroactive in the sense that it applies to cases even though judgment has already become final, so as to require a judicial determination of voluntariness when there was no judicial screening of the issue prior to its presentation to the jury in a setting likely to preju-

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[10]Since my brethren agree that the reasonable doubt standard must govern the trial court in "orthodox" states, they obviously would ascribe no authoritative quality to People v. Golson, 32 Ill. 2d 398, 207 N.E. 2d 68 (1965), cert. denied, 384 U.S. 1023, 86 S.Ct. 1951, 16 L.Ed. 2d 1026 (1966), cited by the majority *supra* note 12. Rather, it illustrates how a few states have failed to come to grips with problems raised by Jackson v. Denno. This is an orthodox jurisdiction court that failed even to cite *Jackson*—and slipped into the indefensible result that in Illinois neither the court nor the jury is required to determine beyond a reasonable doubt that the confession is voluntary. This issue was not raised by the certiorari petition filed in *Golson*.

dice a defendant.[11] This does not govern the question whether similar retroactivity is requisite in a case where there was a preliminary judicial determination but it is contended that although the judge was satisfied of voluntariness he was not convinced beyond a reasonable doubt.

There are substantial considerations for withholding retroactivity as to this aspect of Jackson v. Denno. The fact that the judge was independently "satisfied" of voluntariness removes the most serious prejudice, the prejudice that appears in the case where "some evidence" was enough to bring the confession into the juryroom. There is only a relatively narrow zone of cases in which a judge in a criminal matter will be "satisfied" of voluntariness though he harbors a reasonable doubt.

On the other side of the coin lie considerations of judicial administration. Whether consideration is to be by the same or another judge, it becomes extraordinarily difficult of ascertainment whether a judge who was convinced of voluntariness was or was not convinced beyond a reasonable doubt. The extra margin of convincement assured by the reasonable-doubt standard is an elusive matter difficult to define. Compare McGill v. United States, 121 U.S. App. D.C. 179, 185, 348 F.2d 791, 797 (1965). Applying this standard is difficult enough at trial. The difficulty is enormously increased if the trial has long since been concluded and there is injected in the equation such imponderables as the lack of demeanor evidence of witnesses not now before the court, failure of recollection with the passage of time, inability to reconstruct the atmosphere of the trial. And, of course, a judge at a pre-*Jackson* trial would have had no

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[11] See Johnson v. State of New Jersey, 384 U.S. 719, 729, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966); Linkletter v. Walker, 381 U.S. 618, 628, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965); McNerlin v. Denno, 378 U.S. 575, 84 S.Ct. 1933, 12 L.Ed. 2d 104 (1964); Mitchell v. Stephens 353 F.2d 129, 144 (8th Cir. 1965), cert. denied, 384 U.S. 1019, 86 S.Ct. 1966, 16 L.Ed.2d 1042 (1966); People v. Huntley, 15 N.Y. 2d 72, 255 N.Y.S. 2d 838, 204 N.E. 2d 179 (1965); Commonwealth ex rel. Butler v. Rundle, 416 Pa. 321, 206 A.2d 283, 286 (1965).

occasion to make a particular note of the depth of his conclusion.

In considering whether this aspect of Jackson v. Denno should be applied retroactively, we cannot ignore the fact of the course of decisions in the District of Columbia which did not follow the *Bram* forebear. *Cf.* Linkletter v. Walker, *supra* note 11, at 636 of 381 U.S., at 1741 of 85 S. Ct. It does not matter whether this was right or wrong under the non-constitutional doctrines then deemed applicable; whether it was due to the fact that *Bram* was overlooked, or was then regarded as a poorly considered opinion, whether perhaps the courts felt free to fashion a different common law rule for the District of Columbia treated as a state than the rule applicable in other federal courts. The fact remains that *Bram's* reasonable doubt standard for judges was dormant at best and was not revitalized until Jackson v. Denno.

As the Supreme Court's decisions make clear, the retroactivity issue is not a matter of absolutes. A balance must be struck in terms of the degree of unfairness of what was done and the practical quagmires of correction. As the Court noted in Johnson v. State of New Jersey, *supra* note 11, at 729, of 384 U.S., 86 S. Ct. 1772, it is essentially concerned with a "matter of degree," a "question of probabilities."

In my view the overall interest of justice is achieved by ruling that this aspect of Jackson v. Denno—that the judge must be convinced of voluntariness beyond a reasonable doubt even where the issue is also submitted to the jury—is requisite for subsequent trials, but need not be accorded retrospective application.[12]

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[12]Compare Johnson v. State of New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed. 2d 882 (1966); Thornton v. United States 125 U.S.App.D.C. ____, 368 F.2d 822 (1966).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5037

DON RICHARD LEGO,

Petitioner,

vs.

JOHN TWOMEY, Warden,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-5037

DON RICHARD LEGO,

Petitioner,

vs.

JOHN TWOMEY, Warden,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

Whether a standard other than proof beyond a reasonable doubt may constitutionally be utilized by a trial court making a determination of the voluntariness of a confession upon a motion to suppress.

Whether the defendant in a criminal case has a constitutional right to have the voluntariness of his confession decided by the trial jury even though the question of voluntariness has previously been reliably determined by the trial court.

STATEMENT OF THE CASE

The petitioner was convicted of the offense of armed robbery after trial by a court and jury. The verdict was returned on February 24, 1961 and the Circuit Court fixed sentence at a penitentiary term of twenty-five to fifty years.

Prior to trial, petitioner filed a motion to suppress his confession on the grounds that it was not voluntarily made. (App. 23-24). The trial court held a full pre-trial hearing on the issue of voluntariness. Allegations of physical violence were made and rebutted by police officers.* At the end of the hearing the trial court concluded that "I don't believe the defendant's testimony at all that he was beaten up by the Police." (App. 25).

Upon trial by the jury, the petitioner testified and attacked the validity of his confession.

Following conviction, petitioner appealed directly to the Supreme Court of Illinois alleging error in the failure to conduct a competency hearing, in the determination on the merits of the issue of voluntariness, in the

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*The petitioner discusses some of the details of the evidence at the hearing, presumably to show that since the facts were in dispute, the burden of proof might be significant. (Petr's Br. 7-8). To avoid confusion we note here that the issue of voluntariness is not before this Court. It is significant that the voluntariness of the statement has been previously litigated in federal court and the issue found against petitioner. See United States ex rel. Lego v. Pate, (No. 66, C 129, United States District Court for the Northern District of Illinois, Eastern Division) (unreported). We also note that, in light of the trial Judge's assessment of the credibility of the defendant's contested evidence, it is doubtful that the burden of proof is significant in this case.

determination of the issue of voluntariness in the absence of allegedly material witnesses and the comments of the trial court. The Supreme Court reached the issues on their merits and affirmed the judgment. *People* v. *Lego,* 32 Ill. 2d 76, 203 N.E. 2d 875 (1965). Neither of the issues presented to this Court were decided on petitioner's direct appeal to the Supreme Court of Illinois. After affirmance, petitioner unsuccessfully sought state post-conviction relief but did not appeal the denials of relief.

On April 8, 1968, petitioner sought relief by filing a Petition for a Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. Eventually the District Court considered the merits of petitioner's claims and ruled against them. *United States ex rel. Lego* v. *Pate,* 308 F. Supp. 38 (N.D. Ill. 1970). On October 8, 1970, the Court of Appeals affirmed the District Court, adopting the reasons given in Judge Will's opinion. On March 29, 1971 this Court granted certiorari.

SUMMARY OF ARGUMENT

The standard of proof of guilt beyond a reasonable doubt is designed to protect the innocent. The standard is applied to the evidence as a whole to determine whether the elements of the crime are proved beyond a reasonable doubt. The standard does not apply to the proof of each individual evidentiary fact nor does it govern the question of admissibility of evidence. The contention that the prosecution should be required to establish the constitutional validity of its evidence by proof beyond a reasonable doubt is inconsistent with existing precedent which, in many instances, places the

burden of proof upon defendant to establish his right to exclusion of evidence. More importantly, the exclusionary rules are not primarily intended as a safeguard against the erroneous conviction of the innocent. The application of the reasonable doubt standard to the exclusionary rules will not serve the fundamental purposes underlying that standard. Therefore, there is no justification in the language or the policy of the reasonable doubt rule that requires its application to motions to suppress.

The particular nature of confessions does not require an exception to the general rule that questions of admissibility of evidence are not to be judged by the reasonable doubt standard. The interests protected by other exclusionary rules of evidence relating to search and seizure and eyewitness testimony are as important as those served by the voluntary confessions rule. Moreover, there is no evidence that confessions are intrinsically more damaging than other forms of evidence and good reason to suspect they are not.

The criminal defendant in Illinois is not in a tactically less desirable position than the defendant in *Jackson* v. *Denno*, 378 U.S. 368 (1964). The Illinois defendant is guaranteed a separate hearing on the issue of voluntariness in which the issue is considered isolated from the question of his guilt and, if he prevails, the confession is never heard by the jury. This is far different from the situation in *Jackson* where the effect of the procedure was to deny defendants a separate hearing on the issue of voluntariness. Even if the Illinois procedure presents difficulties for defendants the relative tactical benefits of two differing procedures is not an appropriate criterion for deciding whether either is in conformity with the Constitution. Finally, the defendant in Illinois is not subjected to an unconstitutionally hard choice in

deciding whether to testify at trial concerning a confession admitted after a court finding of voluntariness. His choice is less difficult to make than the decision faced under the procedures approved by this Court with respect to pleas of guilty, discovery against the defense, and sentencing in capital cases.

At common law the jury did not decide questions of admissibility of evidence and the Constitution does not require more of the States than the granting of a common law jury trial. Consequently, the Constitution does not require that a jury trial be held on the issue of the admissibility of a confession. More importantly, it is a basic tenet of *Jackson* v. *Denno* that a jury cannot properly consider the issue of voluntariness and a jury ought not to be asked to decide a question it is incapable of deciding.

ARGUMENT

I.

THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT SHOULD NOT BE CONSTITUTIONALLY REQUIRED WHEN STATE COURTS DETERMINE THE ADMISSIBILITY OF CONFESSIONS.

A.

There Is No Justification In Precedent Or Policy For Requiring The Prosecution To Prove Beyond A Reasonable Doubt Both The Guilt Of The Defendant And The Constitutional Propriety Of Each Item Of Evidence Tending To Establish Guilt.

The requirement of proof of guilt beyond a reasonable doubt is essentially a safeguard against convicting the innocent.[1] "It is the prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970). The standard arises out of concern over potential error in factfinding on questions of guilt [*Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958)] and is reflective of the presumption of innocence [*Coffin* v. *United States*, 156 U.S. 432, 453 (1895)].

The reasonable doubt standard requires proof of "every element of the offense charged beyond a reasonable

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1. It is worth noting that petitioner seems to agree. He relies in his first argument on In Re Winship, 397 U.S. 358 (1970) and Chapman v. California, 386 U.S. 18 (1967) and says of these two cases: "Essentially, they come down to the proposition that 'we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty' 397 U.S. at 372" (Petr's Br. 11).

doubt. . . ." *Holland* v. *United States,* 348 U.S. 121, 138 (1954). The question of proof beyond a reasonable doubt as to all the elements or facts necessary to constitute the crime (*In re Winship,* 397 U.S. at 366) is to be considered in light of all the evidence in the case. *Davis* v. *United States,* 160 U.S. 469, 484 (1895), See *Leland* v. *Oregon,* 343 U.S. 790, 800 (1952).

The petitioner misreads the reasonable doubt rule and argues that it requires that *all* of the facts proved by the prosecution be established beyond a reasonable doubt. This is inconsistent with the settled rule that the "measure of reasonable doubt need not be applied to the specific detailed facts, but only to the whole issue." 9 Wigmore, *Evidence,* § 2497, P. 324 (3rd Ed. 1940); *Commonwealth ex rel. Butler* v. *Rundle,* 429 Pa. 141, 239 A. 2d 426 (1968). Indeed, most of the *facts* concerning the acquisition and admissibility of evidence are not even relevant to the question of guilt and are not ordinarily presented to the trier of fact.

In *United States* v. *Schipani,* 289 F. Supp. 43, 57 (E.D. N.Y. 1968), the principal case cited by petitioner, the court said that the question was one of choosing a proper standard among two alternatives: (a) proof beyond a reasonable doubt by evidence properly admitted in the trial or (b) proof beyond a reasonable doubt by legally obtained evidence. We do not pause to discuss which choice is correct because both alternatives are inappropriate.

Neither the question of proper admission of evidence nor the question of its acquisition are related to the operation of the reasonable doubt rule applied by a trier of fact. The trier of fact must decide whether on all the evidence before it, the defendant has been proven

guilty beyond a reasonable doubt. It is not the concern of the trier of fact whether the evidence before it is properly admitted. Doubt has been expressed as to whether a jury can reasonably be expected to consider questions as to the admissibility of evidence it has heard.[2] See *Jackson* v. *Denno*, 378 U.S. 368, 383 (1964).

The basic contention of the petitioner that the prosecution must prove beyond a reasonable doubt that its evidence was lawfully acquired[3] is faulty for another reason. The exclusionary rules are designed primarily to deter misconduct by law officers. The exclusionary rules are not designed to protect the innocent so much as they are intended to influence official practices. The purpose served by the reasonable doubt standard is protection of the in-

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2. This does not mean that a trier of fact may not also be asked to decide questions of admissibility. But even if this practice is adopted it is clear that the question of admissibility is different from the question of guilt. And at least part of the teaching of Jackson v. Denno, 378 U.S. 368 (1964) is that these questions must be separately considered.

3. The petitioner's position on this point is not completely manifest since he seems first to rely on a reasonable doubt rule and then shifts to the lesser standard of clear and convincing evidence. He states:

> "The Winship and Chapman decisions, in combination, require that the reasonable-doubt standard be applied to all preliminary factual determinations regarding prosecution evidence that has been allegedly obtained by unconstitutional means. For if a lesser standard of proof is permitted at this juncture, the constitutional assurance can be undermined by preliminary determinations on admissibility made on proof which is less than clear and convincing." (Petr's Br. 12).

nocent. The differing purposes served by the two rules are consistently overlooked by petitioner. And it is clear that as important as the purposes the exclusionary rules may be thought to serve, they are not nearly so significant as the protection against an erroneous judgment of guilt. Cf. *Harris* v. *New York*, 401 U.S. 222 (1971). In practical terms it is difficult to see for example how the use of illegally wiretapped conversations concerning disposition of stolen jewels violates any safeguard "against conviction of an innocent man." (Petr's Br. 14).

The existing precedent is inconsistent with petitioner's theories. Ordinarily the court will hear arguments and take evidence, if necessary, before it rules on disputed questions of evidence. But "the rule of reasonable doubt has here no possible application . . ." 9 Wigmore, Evidence, § 2550, p. 503, n. 6 (3rd Ed. 1940). There are isolated categories where such proof is required but even these cases represent minority viewpoints.[4] There are

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4. Though some courts may require that the validity of dying declarations be established beyond a reasonable doubt, most courts adopt lesser standards. See Commonwealth v. Polian, 288 Mass. 494, 193 N.E. 68 (1934) (preponderance), State v. Monich, 74 N.J. 522, 64 A. 1016 (1906) (supported by "any legal evidence"); State v. Brewton, 238 Ore. 590; 344 P. 2d 744 (1959) (any evidence); People v. Ludkowitz, 266 N.Y. 223, 194 N.E. 688 (1935) (clearly established to court's satisfaction); State v. Elias, 205 Minn. 156, 285 N.W. 475 (1939) (proved to court's satisfaction); McKee v. State, 198 Ind. 590, 154 N.E. 372 (1926) ("clearly established"); Ragland v. State, 238 Ala. 587, 192 So. 498 (1939) ("reasonably satisfy" the court).

Evidence of other crimes need not meet the reasonable doubt standard. See Scott v. State, 107 Ohio St. 475, 141 N.E. 19 (1923); People v. Albertson, 23 Cal. 2d 550, 145

many evidentiary rulings of vital importance in criminal trials where the prosecution's burden is less than proof beyond a reasonable doubt.

For example the prosecution need not prove the existence of a conspiracy beyond a reasonable doubt in order to secure the admission of highly damaging out-of-court statements by alleged co-conspirators. See *United States* v. *Elliott*, 437 F. 2d 1253, 1255 (5th Cir. 1971); *People* v. *Morales*, 263 Cal. App. 2d 368, 375-76; 69 Cal. Rptr. 402 (1968), *cert. denied* 393 U.S. 1104. The question of whether a witness is an accomplice may mean the difference between conviction and a directed verdict but the prevailing rule places the burden on defendant to prove that the witness is an accomplice. See *People* v. *Johnson*, —— Cal. App. 3d ——, 95 Cal. Rptr. 316, 318-19 (1971) (cases cited therein).

Examination of the burden of proof in constitutional exclusionary rule cases does not alter this perspective. This Court has dealt only rarely with burden of proof on motions to suppress but it has never imposed a reasonable doubt standard.

Under *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968) the prosecution bears the burden of persuasion when it relies on consent to justify a search. However, under federal rules, the defendant bears the burden of proving the illegality of a seizure of evidence pursuant to warrant. See *United States* v. *Thompson*, 421 F. 2d 373, 377 (5th Cir. 1970); *United States* v. *Cleaver*, 402 F. 2d 148 (9th Cir. 1968); *Irby* v. *United States*, 314 F. 2d

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P. 2d 7 (1944); State v. Waits, 1 Ariz. App. 463, 404 P. 2d 729 (1965); Caruthers v. State, 219 Tenn. 21, 406 S.W. 2d 159 (1966) See also Tucker v. State, 82 Nev. 127, 412 P. 2d 970 (1966) ("plain, clear and convincing evidence").

251, 253 (D.C. Cir. 1963).[5] Under federal rules the defendant must prove that he has standing to object to an illegal seizure. *United States* v. *Sacco*, 436 F. 2d 780, 784 (2nd Cir. 1971); *Fullbright* v. *United States*, 392 F. 2d 432, 435-36 (10th Cir. 1968), *cert. denied* 393 U.S. 830. A federal defendant must prove that wiretapping was unlawfully employed against him in order to secure suppression of wiretap evidence. *Nardone* v. *United States*, 308 U.S. 338, 341 (1939); *Nolan* v. *United States*, 423 F. 2d 1031, 1041 (10th Cir. 1970). A defendant claiming abuse of civil summons must prove that no proper civil purpose underlay the summons. *United States* v. *Ferrone*, 438 F. 2d 381, 387-88 (3rd Cir. 1971). Most significantly, even where the prosecution bears the burden on motions to suppress physical evidence, the burden is not that of reasonable doubt. *Manuel* v. *United States*, 355 F. 2d 344, 346 (5th Cir. 1966).

Many states provide that on motions to suppress seized evidence the burden of proving illegal seizure is, in all cases, except consent search, borne by the defendant. See *People* v. *Berrios*, 28 N.Y. 2d 361, 270 N.E. 2d 709, 712-14 (1971); *People* v. *Wright*, 42 Ill. 2d 457, 248 N.E. 2d 78 (1969); *People* v. *Ferguson*, 376 Mich. 90, 135 N.W. 2d 537 (1965); *State* v. *Holt*, 415 S.W. 2d 761, 764-65 (Mo.

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5. There are several federal cases seemingly holding that the burden of proof is upon defendant to establish the illegality of any challenged seizure but these cases do not seem to represent the prevailing federal rule. See United States v. Morin, 378 F. 2d 472, 475 (2nd Cir. 1967); Watson v. United States, 249 F. 2d 106, 108 (D.C. Cir. 1957); Wilson v. United States, 218 F. 2d 754, 757 (10th Cir. 1955); Jarabo v. United States, 158 F. 2d 509, 513 n. 3 (1st Cir. 1946); United States v. O'Leary, 201 F. Supp. 926, 929 (E.D. Tenn 1961). Cf. United States v. Poppitt, 227 F. Supp. 73, 80-81 (Del. 1964).

1967); *State* v. *Freese*, 166 N.W. 2d 785, 787 (Iowa 1969); *State* v. *Toules*, 155 Conn. 516, 235 A. 2d 639, 640 (1967); *Moore* v. *State*, 244 Ark. 1197, 429 S.W. 2d 122, 125 (1968); *State* v. *Merrill*, 82 S.D. 609, 152 N.W. 2d 349, 351 (1967); *State* v. *Pokini*, 45 Haw. 295, 367 P. 2d 499, 505 (1961); *Booze* v. *State*, 390 P. 2d 261, 265-66 (Okla. 1964); *State* v. *Hall*, 1 Ohio App. 2d 297, 204 N.E. 2d 557, 559-60 (1964).

Of special interest are the "lineup" cases. In *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967) this Court established a right to counsel at lineups and in *Stovall* v. *Denno*, 388 U.S. 293 (1967) recognized a due process right to non-suggestive lineups. In dealing with burdens of proof the Court held that even where there was an illegal lineup, the prosecution could still introduce an in-court identification upon clear and convincing proof that there was an independant basis for such an identification. The burden of proof beyond a reasonable doubt is not required even where there is a clearly established primary illegality. Moreover, the Court was silent on the issue of who bears the burden of proof as to primary illegality. Two states that have explictly decided that question are in agreement that this burden is on the defendant. *People* v. *Caruso*, 68 Cal. 2d 183, 184; 436 P. 2d 336 (1968); *People* v. *Rodriguez*, 10 Cal. App. 3d 18, 88 Cal. Rptr. 789, 796 (1970); *People* v. *Nelson*, 40 Ill. 2d 378, 238 N.E. 2d 378 (1968); *People* v. *Johnson*, 45 Ill. 2d 38, 257 N.E. 2d 3 (1970).

Simply stated, the petitioner's first argument that the prosecution must prove beyond a reasonable doubt that its evidence was lawfully acquired is obviously inconsistent with the pattern of decided cases in this country. It

is unsupported by the policies or the precedents requiring proof of guilt beyond a reasonable doubt. In fact, the only decison on which petitioner relies did not even consider the question of whether such a standard was constitutionally required. See *United States* v. *Schipani*, 289 F. Supp. at 59.

To the extent petitioner relies on *Chapman* v. *California*, 386 U.S. 18 (1967) his reliance seems misplaced. *Chapman* dealt with the problem of the effect of an admitted violation of constitutional rights and sought to prescribe a standard for determining its effect on a trial. *Chapman* gives no guidance as to what rules must be applied in determining whether error did occur. Presumably *Chapman* would not change the federal rule requiring a defendant to prove that a seizure pursuant to a warrant was illegal. *Chapman* would guide the determination of whether the introduction of the seized matter was harmless in a case where the trial court erroneously ruled that the defendant had not sustained his burden of proof.

The petitioner regards *Chapman* as indicative of the importance of protecting against infringements of federal rights. In truth, *Chapman* was significant because it refused to sanction the idea that constitutional infringements can never be held harmless. The extent to which *Chapman* allows a finding of harmless error has been viewed broadly by this Court, so broadly that some have claimed that the restrictions in *Chapman* were overruled. See *Harrington* v. *California*, 395 U.S. 250, 255 (1969) (dissenting opinion).

Lastly, it must be noted that the imposition of a reasonable doubt standard for all questions of exclusion of evidence would add substantial burdens to the existing

criminal justice system and would add these burdens despite the fact that the questions involved do not serve to improve or refine the essential function of that system —the proper resolution of questions of guilt and sentence.

B.

Nothing In The Specific Nature Of Confessions Requires That The Reasonable Doubt Standard Apply To The Question Of Admitting Confessions Into Evidence.

This Court has rarely decided questions of the burden of proof on confession issues. In *Miranda* v. *Arizona* 384 U.S. 436, 475 (1966) the Court held that the prosecution bears a heavy burden to prove waiver of rights but it does not require the prosecution to bear other significant burdens, i.e. proving that the interrogation was non-custodial or that a statement was volunteered. It is generally conceded that the defendant bears the burden of proving a violation of *McNabb-Mallory*. See *United States* v. *Halbert*, 436 F. 2d 1226, 1230 (9th Cir. 1970); *Tillotson* v. *United States*, 231 F. 2d 736 (D.C. Cir. 1956).

In *Sims* v. *Georgia*, 389 U.S. 404 (1967) the petitioner apparently had the initial burden of proof and the error in the case was not said to be the placing of a burden on the accused but rather the failure to rebut the accused's evidence. 389 U.S. at 406. *Sims* is consistent with placing an initial burden, and perhaps even an ultimate burden of proof upon the accused who seeks to suppress his confession. *Sims* was essentially a case in which the burden was met.

The question of whether an accused may bear any burden with respect to suppression of confessions is

not, however, before the Court in this case. Illinois requires the prosecution to bear "the burden of going forward with the evidence and the burden of proving the confession . . . voluntary." The defendant is entitled to insist that the prosecution call all material witneses. This procedure was basically the one under which petitioner was tried. Illinois Annotated Statutes, Ch. 38, Sec. 114-11 (d) (Smith-Hurd) (1964).

Several courts have considered the question of burden of proof on the issue of voluntariness. The majority of jurisdictions adopt standards less than reasonable doubt although several courts have reached a contrary result.[6]

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6. The cases specifically adopting a standard less than reasonable doubt are: People v. Golson, 32 Ill. 2d 398, 207 N.E. 2d 68 (1965) cert. denied 384 U.S. 1023 (preponderance); Commonwealth ex rel. Butler v. Rundle, 429 Pa. 141, 239 A. 2d 426 (1968) (same); Ballew v. State, 249 Ark. ——, 459 S.W. 2d 577 (1970) (same); Monts v. State, 218 Tenn. 31, 400 S.W. 2d 722 (1966) (same); State v. Dillon, 93 Idaho 698, 471 P. 2d 553 (1970) (same); State v. Davis, 73 Wash. 2d 271, 438 P. 2d 185 (1968) (same); United States ex rel. Heath v. Rundle, 298 F. Supp. 1207 (E.D. Pa. 1969); Gardner v. State, 10 Md. App. 233, 269 A. 2d 186 (1970) (prima facie proof of voluntariness); Duncan v. State, 278 Ala. 145, 176 So. 2d 840 (1965) (same); State v. Nolan, 423 S.W. 2d 815 (Mo. 1968) (same); Commonwealth v. White, 353 Mass. 409, 232 N.E. 2d 335 (1967) (Satisfaction of court as to voluntariness); State v. White, 146 Mont. 226, 405 P. 2d 761 (1965) cert. denied 384 U.S. 1023 (same); State v. Brewton, 238 Ore. 590, 395 P. 2d 874 (1964); State v. Crank, 105 Utah 332, 142 P. 2d 178 (1943) (same); State v. Pulliam, 87 Ariz. 216, 349 P. 2d 781 (1960). See also State v. Milow, 199 Kan. 576, 433 P. 2d 538 (1967) (issue of admissibility decided by same rules that govern other preliminary matters).

There is little if any authority that the reasonable doubt standard is constitutionally required.[7] In the principal

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Many jurisdictions never specifically deal with burden of proof but it is clear that the standard is less than reasonable doubt. The usual rule leaves the decision to the trial court whose ruling need only be supported by the record. E.g. Monts v. Henderson, 409 F. 2d 17 (6th Cir. 1969); Moser v. United States, 381 F 2d 363 (9th Cir. 1967); Wakaksaw v. United States, 367 F. 2d 639 (8th Cir. 1966); State v. Clybourn, 273 N.C. 284, 159 S.E. 2d 868 (1968); Dodel v. State, 232 So. 2d 235 (Fla. 1970); Smith v. State, 249 N.E. 2d 493 (Ind. 1969).

The cases adopting a reasonable doubt standard are: United States v. Inman, 352 F. 2d 954 (4th Cir. 1965); Pea v. United States, 397 F. 2d 627 (D.C. Cir., 1968); State v. Ragsdale, 249 La. 420, 187 So. 2d 427 (1966) cert. denied 385 U.S. 1029 (1967); State v. Keiser, 274 Minn. 265, 143 N.W. 2d 75 (1966); Lee v. State, 236 Miss. 716, 112 So. 2d 854 (1959); State v. Longmore, 178 Neb. 509, 139 N.W. 2d 66 (1965); State v. Yough, 49 N.J. 587, 231 A. 2d 598 (1965); People v. Huntley, 15 N.Y. 2d 72, 204 N.E. 2d 179 (1965); State ex rel. Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W. 2d 753 (1965) cert. denied 384 U.S. 1017 (1966); State v. Thundershield, 83 S.D. 414, 160 N.W. 2d 408 (1968); Lopez v. State, 384 S.W. 2d 345 (Texas Crim. 1964); Commonwealth v. Mayhew, 297 Ky. 172, 178 S.W. 2d 928 (1943); People v. Stroud, 273 Cal. App. 2d 670; 78 Cal. Rptr. 270 (1969) (noting that the California Supreme Court has not decided the question); Compare Fernandez v. Beto, 281 F. Supp. 207 (N.D. Texas 1968) with Edwards v. Beto, 446 F. 2d 18 (5th Cir. 1971).

7. One judge has expressed the view that the reasonable doubt standard is constitutionally required. See Clifton v. United States, 371 F. 2d 354, 360 (D.C. Cir. 1966) (concurring opinion). The view was largely if not completely on the premise that the voluntariness requirement is not a mere rule of evidence. 371 F. 2d at 361.

case cited by petitioner, *Pea* v. *United States*, 397 F. 2d 627, 637 (D.C. Cir. 1967), the court expressly grounded its decision on the exercise of supervisory power. See 18 U.S.C., §§ 3501, 3502 (Congressional provisions for admission of confessions); *State* v. *Yough*, 49 N.J. 587, 231 A. 2d 598, 605 (1965).

It is especially significant that the court to which the decision in *Pea* looked for authority has itself explicitly rejected the proposition that the reasonable doubt standard is constitutionally required. In *Pea* the court relied heavily on *United States* v. *Inman*, 352 F. 2d 954 (4th Cir. 1965) which had adopted a reasonable doubt standard. However in *Ralph* v. *Warden*, 438 F. 2d 786, 793 (4th Cir. 1970) the Fourth Circuit said:

> "Ralph now argues that admission of his confession violated the Fifth and Fourteenth Amendments because the court did not find it voluntary beyond a reasonable doubt. This standard, he claims, is required by *United States* v. *Inman*, 352 F. 2d 954 (4th Cir. 1965), and *Mullins* v. *United States*, 382 F. 2d

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The opinion cited Brown v. Walker, 161 U.S. 591, 596-97 (1896) which said of the privilege against self-incrimination "[This] maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of constitutional enactment." It is apparent that the opinion misconstrued Brown v. Walker. Constitutional enactment does make a rule relatively more impregnable than ordinary legal rules. It does not change the nature of the rule itself, it only makes the repeal of the rule more difficult. The power of Congress "To Establish Post Offices and Post Roads" (Art. I, Sec. 8) is clothed with the "impregnability" of constitutional enactment but the nature of the power and the purposes served by its exercise are no different than if the power were non-constitutional in origin, i.e., resting on statutes enacted under the Commerce Clause.

> 258 (4th Cir. 1967), which hold that federal courts in this circuit must find a confession voluntary beyond a reasonable doubt before allowing its presentation to the jury. By their own terms these cases are distinguishable. As we reiterated in *Morris* v. *Boles*, 386 F. 2d 395, 402 (4th Cir. 1967), these cases do not 'prescribe a rule of constitutional application to prosecutions in state courts within this Circuit.' Instead, they rest on our supervisory power over district courts."

See also *Edwards* v. *Beto*, 446 F. 2d 18 (5th Cir. 1971); *Collins* v. *Sullivan*, 319 F. Supp. 184 (Ore. 1970) *Cf. Leland* v. *Oregon*, 343 U.S. 790, 798 (1952).

The petitioner's position in this matter is twofold. His first argument was that the prosecution must prove beyond a reasonable doubt that all of its evidence was constitutionally acquired. His second argument is that even if his first premise fails, the special nature of confessions requires the application of a reasonable doubt standard.

Petitioner contends that the values which underlie the confession rule are more numerous or more important than the values underlying other exclusionary rules. These factors he states are deterrence of police misconduct, unreliability of involuntary admissions and the preservation of the specific guarantees of the fifth amendment privilege against self-incrimination.

This list of factors underlying the confession rule is at least partially incorrect. It is true that probable unreliability of involuntary admissions was mentioned in some early confession cases but in *Rogers* v. *Richmond*, 365 U.S. 534, 540-41 (1965) the Court said:

> ". . . convictions following the admission into evidence of confessions which are involuntary . . . cannot stand. This is so not because such confessions

> are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitional system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth."

The Court further held that voluntariness cannot be judged by reference to a legal standard which took into account the circumstances of probable truth or falsity. See 365 U.S. at 543-44.

It is apparent that deterrence of police misconduct and the specific guarantees of the fifth amendment are now the underpinnings of the involuntary confession rules. Yet the same sort of purposes are served by the fourth amendment exclusionary rules and unless one is prepared to state that fifth amendment rights are vastly more important than fourth amendment rights, there is no reason to apply more stringent rules in confession cases than are applied in search cases. In the case of eyewitness identification exclusionary rules, the same purpose of deterrence of police misconduct is served as well as the protection of the sixth amendment right to counsel. Indeed, those exclusionary rules are grounded on the additional concern with the reliability of eyewitness evidence but the reasonable doubt standard is not required and, to some extent, burdens of proof are placed on the defendant. The "values" underlying the confession cases are no more extensive or important than the values served by other exclusionary rules.

The petitioner claims that an accused's confession will likely have greater importance in the trial than will other forms of evidence excluded by constitutional man-

date. It is difficult, of course, for any reviewing court to weigh generally the relative importance of evidence in criminal cases. Reviewing courts do not, except for certain uncommon advisory opinion provisions in a few states, entertain appeals from acquittals. It is impossible to judge the effect of evidence when one sees only the records of convictions. The words of one trial judge in this regard are appropriate here:

> "Any evidence which is illegally obtained may be damning, so that the decision cannot turn on the importance of a confession in a case. Frequently, having lost on a motion to suppress, the defendant's chance of avoiding conviction is hopeless. A 'Confession' may contain exculpatory material, be incomplete, or be unreliable so that it is no more the equivalent of a plea of guilty than is key evidence illegally obtained. Certainly the burden of proof at a preliminary hearing should not depend upon how critical the evidence sought to be suppressed may be at the trial. The judge is often unable to accurately predict at that stage whether a particular item of evidence will clinch the prosecution's case."

This comment is of special note since it comes from the chief, if not sole, opinion on which the petitioner relies in Point I. A. of his argument. The quote is found in *United States* v. *Schipani*, 289 F. Supp. at 58.

It is clear that many items of proof may be far more damaging that confessions. Many confessions are given only because the suspect realizes that the other evidence against him is overwhelming. The seizure of a large quantity of heroin from the person of the defendant or the finding of stolen jewels in his briefcase or the testimony of an undercover agent or the tapes of defendant's conversations planning or executing a crime will usually cause any confession to pale into insignificance. The testi-

mony of eyewitnesses is thought by many to be more damaging than a confession. The evidence acquired by seizure or given by eyewitnesses rarely contains the kind of self-serving excuses or disclaimers of intent present in many confessions. To the extent that juries may entertain suspicions of the reliability of confessions the defendant is in a better position to argue against the weight of such evidence than he is to argue about the reliability of the comparison of his fingerprints (the securing of which may present a question for the exclusionary rule) with the fingerprints found at the scene of the crime or on a murder weapon.

The petitioner offers no evidence to support his contention that confessions are inherently more damaging than other forms of evidence. No such evidence exists. In many cases confessions may be less important than other forms of evidence. There can easily be overwhelming evidence in a case where no confession was made and cases in which confessions were made can be extraordinarily weak.

In sum, the petitioner's attempted distinction between confessions and other forms of evidence subject to constitutional exclusion is unsupported and ought to fail.

C.

Jackson v. Denno Does Not Require The Application Of A Reasonable Doubt Standard To The Determination Of The Admissibility Of A Confession.

Jackson v. *Denno,* 378 U.S. 368, 395 (1964) held that "a proper determination of voluntariness be made prior to the admission of the confession to the jury." See also *Boles* v. *Stevenson,* 379 U.S. 43 (1964); *Sims* v. *Georgia,* 385 U.S. 538 (1967); *Boykin* v. *Alabama,* 395 U.S. 238

resolution of guilt questions and which is subject to review on appeal.

Finally, it is clear that the Constitution does not protect a defendant from having to make hard choices. *McGautha* v. *California*, 402 U.S. 183, 213 (1971). The defendant has no right to an adjudication that the prosecution's evidence will establish guilt beyond a reasonable doubt before he decides whether to plead guilty. Nor is he entitled to a clear and correct adjudication of the admissibility of the evidence against him before he decides his plea. He may have to decide between risking his life to challenge the procedures used against him and saving his life by submitting and pleading guilty. These kinds of choices a defendant may be compelled to make. See *McMann* v. *Richardson*, 397 U.S. 759 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970); *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

In particular the decision to testify or to offer a defense is traditionally forced upon a defendant without any adjudication that the evidence against him proves his guilt beyond a reasonable doubt. See *Pierce* v. *United States*, 252 U.S. 239, 251-52 (1920); *Johnson* v. *United States*, 426 F. 2d 651, 653 (D.C. Cir. 1970) (standard for directed verdict is whether evidence could persuade a jury to find guilt beyond a reasonable doubt); *United States* v. *Feinberg*, 140 F. 2d 592, 594 (2nd Cir. 1944) (L. Hand, J.) *cert. denied* 322 U.S. 726 (preponderance of the evidence) Courts do not pass upon questions of credibility on motions for directed verdicts at the end of the prosecution's case and, it is after the denial of such motions that the defendant must choose to testify. He must decide whether to risk not only impeachment

but the possible strengthening of the case against him. *McGautha* v. *California*, 402 U.S. 183, 215-16 (1971); *Johnson* v. *United States*, 426 F. 2d at 655-56. Decisions to testify or to offer a defense are hard decisions and forced decisions and are all made before there is any adjudication based on a reasonable doubt standard. Cf. *Williams* v. *Florida*, 399 U.S. 78, 84-85 (1970). Under the standards established in *McGautha* v. *California*, 402 U.S. at 213-20, a defendant in Illinois who is given a totally separate hearing and adjudication on the issue of voluntariness prior to trial is not placed in an unfair position when he must thereafter choose whether to dispute his confession at trial.

The Illinois procedure does not require a criminal defendant to face unconstitutionally harsh dilemmas nor does it fail to provide for a clear-cut, reliable determination of voluntariness required by *Jackson* v. *Denno*.

II.

THERE IS NO CONSTITUTIONAL REQUIREMENT THAT THE DEFENDANT RECEIVE A JURY TRIAL ON THE ISSUE OF THE VOLUNTARINESS OF HIS CONFESSION.

Duncan v. *Louisiana*, 391 U.S. 145 (1968) imposed the common law right to jury trial embodied in the sixth amendment upon the States. It did not expand the traditional common law function of the jury which was insulated from decisions as to the admissibility of evidence. *Jackson* v. *Denno*, 378 U.S. at 387 n. 13; 3 Wigmore, *Evidence*, § 861, P. 345 (3rd Ed. 1940) (P. 568 in Chadbourn Rev. 1970) (admission of confession is a question for the judge). Nevertheless, petitioner claims that *Duncan* re-

(1969). The Court did not comment on the question of burden of proof. See 378 U.S. at 404-05 (dissenting opinion). It is difficult to conceive that the necessary implication of *Jackson* v. *Denno* is a determination that the standards of proof used to determine the merits of the cause in nearly every important state and federal civil litigation are insufficient to insure a reliable determination of the preliminary question of voluntariness of a defendant's statements.

In *Jackson* the Court ruled that the "overall determination of . . . voluntariness . . . requires facing the issue squarely, in illuminating isolation and unbeclouded by other issues and the effect of extraneous but prejudicial evidence." 378 U.S. at 390. The Court recognized the rights to a "reliable and clear cut determination of . . . voluntariness" 378 U.S. at 391 and "to have an involuntary confession entirely disregarded" 378 U.S. at 389. Neither right was adequately protected by leaving the question of voluntariness to the jury. First, it was impossible to know whether the jury did actually decide the question of voluntariness. 378 U.S. at 379-80. Further, the jury's judgment on the issue of voluntariness was likely to be improperly influenced by their judgment as to the guilt of the defendant and the truthfulness of the confession. 378 U.S. at 381, 386.

The petitioner claims that, in a tactical sense, he is in worse position under the Illinois procedure than he would have been under the old New York procedure. Even if this were so (and it is not), the relative tactical benefit to criminal defendants is scarcely an appropriate criterion for the delineation of constitutional rights. *Jackson* v. *Denno* did not decide that whatever makes it more diffi-

cult to present confessions to the jury is constitutionally required.

The petitioner submits that "many criminal defendants" would prefer the old New York procedure to the present Illinois practice. (Petr's Br. 19). We think this assertion is incredible. At the very least, it is untenable in light of the findings of *Jackson* v. *Denno*. In *Jackson* the Court said:

> "Under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness." (378 U.S. at 386).

In essence, under New York procedure it did not matter what the standard of proof of voluntariness was because the practice prevented the defendant from ever getting a hearing on the isolated issue of voluntariness.

The petitioner further argues that the Illinois procedure places a defendant in the same hard dilemma a New York defendant faced in determining whether he wished to testify before the jury on the issue of voluntariness and risk impeachment. The short answer to the argument is that the Illinois defendant is not in the same position. Unlike the New York defendant, he is entitled to a pre-trial determination of voluntariness before the jury even hears the confession. He may give his testimony at a motion to suppress and that testimony cannot be used against him at a trial either in the prosecution's case-in-chief [*Simmons* v. *United States,* 390 U.S. 377, 394 (1968)] or for purposes of impeachment [*People* v. *Luna,* 37 Ill. 2d 299, 308; 226 N.E. 2d 586 (1967)]. The petitioner has received a clear-cut determination on the issue of voluntariness which is isolated from

quires that the jury determine voluntariness.[8]

It has been held that the submission of issues of voluntariness to the jury is not constitutionally required. *United States* v. *Panepinto,* 430 F. 2d 613, 617-18 (3rd Cir. 1970). It also seems that *Jackson* v. *Denno,* implicitly approved the Illinois practice which follows the orthodox rule. 378 U.S. at 378.

Whether *Jackson* v. *Denno* so held is not important for the findings of the Court in *Jackson* v. *Denno* make it abundantly clear that the jury does not and cannot properly resolve questions of voluntariness. To reiterate, the Court found that a jury which considers voluntariness along with the evidence in the whole case[9] is trapped by a procedure that "inevitably injects irrelevant and impermissible considerations . . . into the assessment of voluntariness." 378 U.S. at 386.

The practice in Illinois is to allow the defendant to challenge the weight and credibility of his confession before the jury. In this case, petitioner did just that. (R. 223-26). However, even in those jurisdictions where the jury is supposed to decide voluntariness as well as weight, the jury does not do so. It does the same thing

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8. If the Court were to hold that this is true, it's ruling should be fully prospective (De Stefano v. Woods, 392 U.S. 631 (1968) except, of course, for petitioner in this case. See Stovall v. Denno, 388 U.S. 293 (1967).

9. We do not read petitioner's argument to call for a separate jury at the hearing on the motion to suppress. Yet it seems apparent that only such a jury can be said to have considered voluntariness and decided the issue. Neither Duncan nor existing trial practice nor the best interests of the administration of criminal justice lends support to the notion of a jury trial on motions to suppress.

that the Illinois jury does, it judges the credibility of the confession in light of the circumstances of its making including the circumstances relevant to the issue of voluntariness. *E. g. Illinois Pattern Jury Instructions—Criminal* 3.07 (1968). It is the fundamental teaching of *Jackson* v. *Denno* that this is all a jury can be expected to do.

If it is not clear enough from *Jackson* v. *Denno* that a jury cannot perform the mental gymnastics required in separating questions of voluntariness from questions of truthfulness and guilt, then *Bruton* v. *United States*, 391 U.S. 123 (1968) should remove any doubt. There the Court said that "we explicitly rejected the proposition that a jury, when determining the confessor's guilt, could be relied on to ignore his confession of guilt should they find the confession involuntary." (391 U.S. at 129).

Simply stated, a jury ought not to be constitutionally required to decide a question that this Court recognizes it is incapable of deciding.

CONCLUSION

The respondent Warden asks that the judgments of the United States Court of Appeals for the Seventh Circuit and of the United States District Court for the Northern District of Illinois be affirmed.

Respectfully submitted,

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LEGO *v.* TWOMEY, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 70–5037. Argued November 11, 1971—
Decided January 12, 1972

Following a pretrial suppression hearing at which conflicting evidence was presented as to the voluntariness of a confession that petitioner had given the police, the trial judge, presumably applying the Illinois preponderance-of-the-evidence standard, held the confession admissible, and it was introduced into evidence at the trial, which resulted in petitioner's conviction. The judge had instructed the jury as to the prosecution's burden of proving guilt but did not instruct that the jury had to find the confession voluntary before it could be used in reaching its verdict. In a habeas corpus proceeding petitioner challenged his conviction. The District Court denied relief, and the Court of Appeals affirmed. Petitioner contends, relying upon *In re Winship*, 397 U. S. 358, that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence, or, alternatively, that the admissibility of the confession as evidence in a criminal trial (quite apart from its probative value) had to be determined by a reasonable-doubt standard to protect the values that exclusionary rules are designed to serve. Petitioner also urges that, even though the trial judge ruled on his coercion claim, he was entitled under *Duncan* v. *Louisiana*, 391 U. S. 145, to have the jury decide that issue anew. *Held:*

1. The hearing on the voluntariness of a confession required by this Court's decision in *Jackson* v. *Denno*, 378 U. S. 368, is not designed to implement the presumption of innocence and enhance the reliability of jury verdicts, but to prevent the use of a coerced confession as violative of due process quite apart from its truth or falsity. Consequently, determining the admissibility of a confession by a preponderance of the evidence is not inconsistent with the mandate of *In re Winship, supra*. Pp. 482–487.

2. Petitioner has not demonstrated that admissibility rulings based on the preponderance-of-evidence standard are unreliable or that imposition of any higher standard under expanded exclusionary rules would be sufficiently productive to outweigh the

public interest in having probative evidence available to juries. Pp. 487–489.

3. The procedure followed here comported with the requirements of *Jackson, supra,* and petitioner was not entitled to have the voluntariness issue which had been resolved by the trial judge also submitted to a jury for its separate consideration. Nor did *Duncan, supra,* change the rule that determining the admissibility of evidence is a function of the court rather than of the jury. Pp. 489–490.

Affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post,* p. 490. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

Nathan Lewin, by appointment of the Court, 402 U. S. 928, argued the cause and filed a brief for petitioner.

James B. Zagel, Assistant Attorney General of Illinois, argued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *Warren K. Smoot,* Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

In 1964 this Court held that a criminal defendant who challenges the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. *Jackson* v. *Denno,* 378 U. S. 368. While our decision made plain that only voluntary confessions may be admitted at the trial of guilt or innocence, we did not then announce, or even suggest, that the factfinder at a coercion hearing need judge voluntariness with reference to an especially severe standard of proof. Never-

theless, since *Jackson*, state and federal courts have addressed themselves to the issue with a considerable variety of opinions.[1] We granted certiorari in this case to resolve the question. 401 U. S. 992 (1971).

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[1] State courts which have considered the question since *Jackson* have adopted a variety of standards, most of them founded upon state law. Many have sanctioned a standard of proof less strict than beyond a reasonable doubt, including proof of voluntariness by a preponderance of the evidence or to the satisfaction of the court or proof of voluntariness in fact. *E. g., Duncan* v. *State*, 278 Ala. 145, 176 So. 2d 840 (1965); *State* v. *Dillon*, 93 Idaho 698, 471 P. 2d 553 (1970), cert. denied, 401 U. S. 942 (1971); *People* v. *Harper*, 36 Ill. 2d 398, 223 N. E. 2d 841 (1967); *State* v. *Milow*, 199 Kan. 576, 433 P. 2d 538 (1967); *Barnhart* v. *State*, 5 Md. App. 222, 246 A. 2d 280 (1968); *Commonwealth* v. *White*, 353 Mass. 409, 232 N. E. 2d 335 (1967); *State* v. *Nolan*, 423 S. W. 2d 815 (Mo. 1968); *State* v. *White*, 146 Mont. 226, 405 P. 2d 761 (1965), cert. denied, 384 U. S. 1023 (1966); *State* v. *Brewton*, 238 Ore. 590, 395 P. 2d 874 (1964); *Commonwealth ex rel. Butler* v. *Rundle*, 429 Pa. 141, 239 A. 2d 426 (1968); *Monts* v. *State*, 218 Tenn. 31, 400 S. W. 2d 722 (1966); *State* v. *Davis*, 73 Wash. 2d 271, 438 P. 2d 185 (1968).

Other States, using state law or not specifying a basis, require proof beyond a reasonable doubt. *E. g., State* v. *Ragsdale*, 249 La. 420, 187 So. 2d 427 (1966), cert. denied, 385 U. S. 1029 (1967); *State* v. *Keiser*, 274 Minn. 265, 143 N. W. 2d 75 (1966); *State* v. *Yough*, 49 N. J. 587, 231 A. 2d 598 (1967); *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965); *State* v. *Thundershield*, 83 S. D. 414, 160 N. W. 2d 408 (1968); *State ex rel. Goodchild* v. *Burke*, 27 Wis. 2d 244, 133 N. W. 2d 753 (1965), cert. denied, 384 U. S. 1017 (1966).

Two federal courts have held as an exercise of supervisory power that voluntariness must be proved beyond a reasonable doubt. *Ralph* v. *Warden*, 438 F. 2d 786, 793 (CA4 1970), clarifying *United States* v. *Inman*, 352 F. 2d 954 (CA4 1965); *Pea* v. *United States*, 130 U. S. App. D. C. 66, 397 F. 2d 627 (1967); cf. *United States* v. *Schipani*, 289 F. Supp. 43 (EDNY 1968), aff'd, 414 F. 2d 1262 (CA2 1969), cert. denied, 397 U. S. 922 (1970), requiring the Government to prove beyond a reasonable doubt that certain evidence was not tainted by violation of the Fourth Amendment.

Petitioner Lego was convicted of armed robbery in 1961 after a jury trial in Superior Court, Cook County, Illinois. The court sentenced him to prison for 25 to 50 years. The evidence introduced against Lego at trial included a confession he had made to police after arrest and while in custody at the station house. Prior to trial Lego sought to have the confession suppressed. He did not deny making it but did challenge that he had done so voluntarily. The trial judge conducted a hearing, out of the presence of the jury, at which Lego testified that police had beaten him about the head and neck with a gun butt. His explanation of this treatment was that the local police chief, a neighbor and former classmate of the robbery victim, had sought revenge upon him. Lego introduced into evidence a photograph that had been taken of him at the county jail on the day after his arrest. The photograph showed that petitioner's face had been swollen and had traces of blood on it. Lego admitted that his face had been scratched in a scuffle with the robbery victim but maintained that the encounter did not explain the condition shown in the photograph. The police chief and four officers also testified. They denied either beating or threatening petitioner and disclaimed knowledge that any other officer had done so. The trial judge resolved this credibility problem in favor of the police and ruled the confession admissible.[2] At trial, Lego testified in his own behalf. Although he did not dispute the truth of the confession directly, he did tell his version of the events that had transpired at the

[2] In ruling the confession admissible, the judge stated:

"The petitioner has admitted under oath he had a struggle with the complaining witness over the gun; he was wounded, obtained a facial wound. The Officers testified he was bloody at the time he was arrested.

"I don't believe the defendant's testimony at all that he was beaten up by the Police. The condition he is in is well explained by the defendant himself."

police station. The trial judge instructed the jury as to the prosecution's burden of proving guilt. He did not instruct that the jury was required to find the confession voluntary before it could be used in judging guilt or innocence.[3] On direct appeal the Illinois Supreme Court affirmed the conviction. *People* v. *Lego*, 32 Ill. 2d 76, 203 N. E. 2d 875 (1965).

Four years later petitioner challenged his conviction by seeking a writ of habeas corpus in the United States District Court for the Northern District of Illinois. He maintained that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence. Although the judge had made no mention of the standard he used, Illinois law provided that a confession challenged as involuntary could be admitted into evidence if, at a hearing outside the presence of the jury, the judge found it voluntary by a preponderance of the evidence.[4] In the alternative petitioner argued that the voluntariness question should also have been submitted to the jury for its separate con-

[3] Illinois followed what we described in *Jackson* v. *Denno*, 378 U. S. 368 (1964), as "the orthodox rule, under which the judge himself solely and finally determines the voluntariness of the confession . . . ." *Id.*, at 378. While the procedures of all the States could not be neatly classified, we noted that some followed the Massachusetts procedure whereby the judge himself first resolves evidentiary conflicts and determines whether a confession is in fact voluntary. If he is unable so to conclude, the confession may not be admitted into evidence. If judged voluntary and therefore admissible, the jury must also determine the coercion issue and is instructed to ignore a confession it finds involuntary. *Id.*, at 378 n. 8. Other States had adopted the New York procedure at issue in *Jackson*. Our decision in *Jackson* cast no doubt upon the orthodox and Massachusetts procedures but did call into question the practice of every State that did not clearly follow one of these procedures. A thorough tabulation of what States did in the wake of *Jackson* appears in 3 J. Wigmore, Evidence 585–593 (J. Chadbourn rev. 1970).

[4] *People* v. *Wagoner*, 8 Ill. 2d 188, 133 N. E. 2d 24 (1956); *People* v. *Thomlison*, 400 Ill. 555, 81 N. E. 2d 434 (1948).

sideration. After first denying the writ for failure to exhaust state remedies, the District Court granted a rehearing motion, concluded that Lego had no state remedy then available to him and denied relief on the merits. *United States ex rel. Lego* v. *Pate*, 308 F. Supp. 38 (1970).[5] The Court of Appeals for the Seventh Circuit affirmed.[6]

I

Petitioner challenges the judgment of the Court of Appeals on three grounds. The first is that he was not proved guilty beyond a reasonable doubt as required by *In re Winship*, 397 U. S. 358 (1970), because the confession used against him at his trial had been proved voluntary only by a preponderance of the evidence. Implicit in the claim is an assumption that a voluntariness hearing is designed to enhance the reliability of jury verdicts. To judge whether that is so we must return to *Jackson* v. *Denno*, 378 U. S. 368 (1964).

In New York prior to *Jackson*, juries most often determined the voluntariness of confessions and hence whether confessions could be used in deciding guilt or innocence. Trial judges were required to make an initial determination and could exclude a confession, but only if it could not under any circumstances be deemed voluntary.[7] When voluntariness was fairly debatable, either because a dispute of fact existed or because reasonable men could have drawn differing inferences from undisputed facts, the question whether the confession violated due process was for the jury. This meant the confession

[5] Respondent makes no contention here that petitioner either waived the right to adjudicate his federal claims or deliberately bypassed state procedures for testing those claims. Cf. *Fay* v. *Noia*, 372 U. S. 391, 439 (1963).

[6] The Seventh Circuit's affirmance is unreported. *United States ex rel. Lego* v. *Pate*, No. 18313 (CA7 Oct. 8, 1970).

[7] A more thorough description of the New York procedure is found in *Jackson* v. *Denno*, 378 U. S., at 377–391.

was introduced at the trial itself. If evidence challenging its voluntariness were adduced, the jury was instructed first to pass upon voluntariness and, if it found the confession involuntary, ignore it in determining guilt. If, on the other hand, the confession were found to be voluntary, the jury was then free to consider its truth or falsity and give the confession an appropriate weight in judging guilt or innocence.

We concluded that the New York procedure was constitutionally defective because at no point along the way did a criminal defendant receive a clear-cut determination that the confession used against him was in fact voluntary. The trial judge was not entitled to exclude a confession merely because he himself would have found it involuntary, and, while we recognized that the jury was empowered to perform that function, we doubted it could do so reliably. Precisely because confessions of guilt, whether coerced or freely given, may be truthful and potent evidence, we did not believe a jury could be called upon to ignore the probative value of a truthful but coerced confession; it was also likely, we thought, that in judging voluntariness itself the jury would be influenced by the reliability of a confession it considered an accurate account of the facts. "It is now axiomatic," we said,

> "that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers* v. *Richmond,* 365 U. S. 534, and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *New York,* 324 U. S. 401; *Stroble* v. *California,* 343 U. S. 181; *Payne* v. *Arkansas,* 356 U. S. 560. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the con-

> fession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession. *Rogers* v. *Richmond, supra.*" [8]

We did not think it necessary, or even appropriate, in *Jackson* to announce that prosecutors would be required to meet a particular burden of proof in a *Jackson* hearing held before the trial judge.[9] Indeed, the then-established duty to determine voluntariness had not been framed in terms of a burden of proof,[10] nor has it been since *Jackson* was decided.[11] We could fairly assume then, as we can now, that a judge would admit into evidence only those confessions that he reliably found, at least by a preponderance of the evidence, had been made voluntarily.

We noted in *Jackson* that there may be a relationship between the involuntariness of a confession and its unreliability.[12] But our decision was not based in the

[8] *Jackson* v. *Denno*, 378 U. S., at 376–377.

[9] "Judge" is used here and throughout the opinion to mean a factfinder, whether trial judge or jury, at a voluntariness hearing. The proscription against permitting the jury that passes upon guilt or innocence to judge voluntariness in the same proceeding does not preclude the States from impaneling a separate jury to determine voluntariness. *Jackson* v. *Denno*, 378 U. S., at 391 n. 19.

[10] See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Spano* v. *New York*, 360 U. S. 315 (1959); *Payne* v. *Arkansas*, 356 U. S. 560 (1958).

[11] See, *e. g.*, *Frazier* v. *Cupp*, 394 U. S. 731 (1969); *Boulden* v. *Holman*, 394 U. S. 478 (1969); *Harrison* v. *United States*, 392 U. S. 219 (1968); *Greenwald* v. *Wisconsin*, 390 U. S. 519 (1968); *Clewis* v. *Texas*, 386 U. S. 707 (1967); *Davis* v. *North Carolina*, 384 U. S. 737 (1966); cf. *Procunier* v. *Atchley*, 400 U. S. 446 (1971).

[12] We noted that coerced confessions are forbidden in part because of their "probable unreliability." *Jackson* v. *Denno*, 378 U. S., at 385–386. However, it had been settled when this Court decided *Jackson* that the exclusion of unreliable confessions is not the purpose which a voluntariness hearing is designed to serve.

slightest on the fear that juries might misjudge the accuracy of confessions and arrive at erroneous determinations of guilt or innocence. That case was not aimed at reducing the possibility of convicting innocent men.

Quite the contrary, we feared that the reliability and truthfulness of even coerced confessions could impermissibly influence a jury's judgment as to voluntariness. The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles. *Rogers* v. *Richmond*, 365 U. S. 534, 540–541 (1961).[13] The procedure we established in *Jackson* was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances. Nothing in *Jackson* questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has

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Rogers v. *Richmond*, 365 U. S. 534 (1961). The sole issue in such a hearing is whether a confession was coerced. Whether it be true or false is irrelevant; indeed, such an inquiry is forbidden. The judge may not take into consideration evidence that would indicate that the confession, though compelled, is reliable, even highly so. *Id.*, at 545. As difficult as such tasks may be to accomplish, the judge is also duty-bound to ignore implications of reliability in facts relevant to coercion and to shut from his mind any internal evidence of authenticity that a confession itself may bear.

[13] In *Jackson*, 378 U. S., at 377–391, we traced the genesis of the view that due process forbids the use of coerced confessions, whether or not reliable. The Court had departed from that view in *Stein* v. *New York*, 346 U. S. 156 (1953), whose premise was that a confession is excludable because of its inherent untrustworthiness. The *Stein* premise was repudiated in *Rogers* v. *Richmond* and *Rogers* was reaffirmed in *Davis* v. *North Carolina*, 384 U. S., at 739, and *Johnson* v. *New Jersey*, 384 U. S. 719, 729 n. 9 (1966). That case continues to serve as the basis for evaluating coercion claims. See cases cited in n. 11, *supra*.

been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness.[14] In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief.

Since the purpose that a voluntariness hearing is designed to serve has nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship*, 397 U. S. 358 (1970). Our decision in *Winship* was not concerned with standards for determining the admissibility of evidence or with the prosecution's burden of proof at a suppression hearing when evidence is challenged on constitutional grounds. *Winship* went no further than to confirm the fundamental right that protects "the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. A high standard of proof is

[14] This is the course that petitioner pursued. Cf. *Jackson* v. *Denno*, 378 U. S., at 386 n. 13. Although 18 U. S. C. § 3501 (a) is inapplicable here, it is relevant to note the provisions of that section:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

necessary, we said, to ensure against unjust convictions by giving substance to the presumption of innocence. *Id.*, at 363. A guilty verdict is not rendered less reliable or less consonant with *Winship* simply because the admissibility of a confession is determined by a less stringent standard. Petitioner does not maintain that either his confession or its voluntariness is an element of the crime with which he was charged. He does not challenge the constitutionality of the standard by which the jury was instructed to decide his guilt or innocence; nor does he question the sufficiency of the evidence that reached the jury to satisfy the proper standard of proof. Petitioner's rights under *Winship* have not been violated.[15]

II

Even conceding that *Winship* is inapplicable because the purpose of a voluntariness hearing is not to implement the presumption of innocence, petitioner presses for reversal on the alternative ground that evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt in order to give adequate protection to those values that exclusionary rules are designed to serve. *Jackson* v. *Denno, supra,* an offspring of *Brown* v. *Mississippi,* 297 U. S. 278 (1936), requires judicial rulings on voluntariness prior to admitting confessions. *Miranda* v. *Arizona,* 384

[15] Nothing is to be gained from restating the constitutional rule as requiring proof of guilt beyond a reasonable doubt on the basis of constitutionally obtained evidence and then arguing that rights under *Winship* are diluted unless admissibility is governed by a high standard. Transparently, this assumes the question at issue, which is whether a confession is admissible if found voluntary by a preponderance of the evidence. *United States* v. *Schipani, supra,* n. 1, followed this unsatisfactory course in a Fourth Amendment case but stopped short of basing the decision on the Constitution.

U. S. 436 (1966), excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained. *Weeks* v. *United States*, 232 U. S. 383 (1914), and *Mapp* v. *Ohio*, 367 U. S. 643 (1961), make impermissible the introduction of evidence obtained in violation of a defendant's Fourth Amendment rights. In each instance, and without regard to its probative value, evidence is kept from the trier of guilt or innocence for reasons wholly apart from enhancing the reliability of verdicts. These independent values, it is urged, themselves require a stricter standard of proof in judging admissibility.

The argument is straightforward and has appeal. But we are unconvinced that merely emphasizing the importance of the values served by exclusionary rules is itself sufficient demonstration that the Constitution also requires admissibility to be proved beyond reasonable doubt.[16] Evidence obtained in violation of the Fourth Amendment has been excluded from federal criminal trials for many years. *Weeks* v. *United States*, *supra*. The same is true of coerced confessions offered in either federal or state trials. *Bram* v. *United States*, 168 U. S. 532 (1897); *Brown* v. *Mississippi*, *supra*. But, from our experience over this period of time no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence. Petitioner offers nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard. Without good cause, we are unwilling to expand currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evi-

[16] It is no more persuasive to impose the stricter standard of proof as an exercise of supervisory power than as a constitutional rule. Cf. *Ralph* v. *Warden*, *supra*, n. 1, clarifying *United States* v. *Inman*, *supra*, n. 1; *Pea* v. *United States*, *supra*, n. 1.

dence before state juries and by revising the standards applicable in collateral proceedings. Sound reason for moving further in this direction has not been offered here nor do we discern any at the present time. This is particularly true since the exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in Fourth and Fifth Amendment suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.

To reiterate what we said in *Jackson:* when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary. Of course, the States are free, pursuant to their own law, to adopt a higher standard. They may indeed differ as to the appropriate resolution of the values they find at stake.[17]

III

We also reject petitioner's final contention that, even though the trial judge ruled on his coercion claim, he was entitled to have the jury decide the claim anew. To the extent this argument asserts that the judge's determination was insufficiently reliable, it is no more persuasive than petitioner's other contentions. To the extent the position assumes that a jury is better suited than a judge to determine voluntariness, it questions the basic assumptions of *Jackson* v. *Denno;* it also ignores

[17] See cases cited in n. 1, *supra.*

that *Jackson* neither raised any question about the constitutional validity of the so-called orthodox rule for judging the admissibility of confessions nor even suggested that the Constitution requires submission of voluntariness claims to a jury as well as a judge. Finally, *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which made the Sixth Amendment right to trial by jury applicable to the States, did not purport to change the normal rule that the admissibility of evidence is a question for the court rather than the jury. Nor did that decision require that both judge and jury pass upon the admissibility of evidence when constitutional grounds are asserted for excluding it. We are not disposed to impose as a constitutional requirement a procedure we have found wanting merely to afford petitioner a second forum for litigating his claim.

The decision of the Court of Appeals is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

When the prosecution, state or federal, seeks to put in evidence an allegedly involuntary confession, its admissibility is determined by the command of the Fifth Amendment that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Davis* v. *North Carolina*, 384 U. S. 737, 740 (1966); *Malloy* v. *Hogan*, 378 U. S. 1, 7–8 (1964); *Bram* v. *United States*, 168 U. S. 532, 542–543 (1897). This right against compulsory self-incrimination is the "essential mainstay" of our system of criminal prosecution, *Malloy* v. *Hogan*, *supra*, at 7, "a system in which the State must establish guilt by evidence independently

and freely secured and may not by coercion prove its charge against an accused out of his own mouth," *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961). What is thereby protected from governmental invasion is, quite simply, "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, *supra*, at 8. Hence, a confession is involuntary and inadmissible unless it is "the product of a rational intellect and a free will." *Blackburn* v. *Alabama*, 361 U. S. 199, 208 (1960); see *Reck* v. *Pate*, 367 U. S. 433, 440 (1961).

Ideally, of course, a defendant's compelled utterance would never be admitted into evidence against him. As we said in *Jackson* v. *Denno*, 378 U. S. 368, 376 (1964), it is "axiomatic" that a criminal conviction cannot stand if it "is founded, in whole or in part, upon an involuntary confession . . . even though there is ample evidence aside from the confession to support the conviction." Yet I doubt that informed observers of the criminal process would deny that at least some compelled utterances slip through, even assuming scrupulous adherence to constitutional standards and the most rigorous procedural protections. *Jackson* was an attempt to move that reality somewhat closer to the ideal. We there rejected the New York rule because it "did not afford a reliable determination of the voluntariness of the confession offered in evidence at the trial" and consequently "did not adequately protect [a defendant's] right to be free of a conviction based upon a coerced confession." *Id.*, at 377. As the Court today points out, "[t]he procedure we established in *Jackson* was designed to safeguard the right of an individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances." *Ante*, at 485.

There is no need to dwell upon the importance our American concept of justice attaches to preserving the

integrity of the constitutional privilege. Both the rule that automatically reverses a conviction when an involuntary confession was admitted at trial and the procedure established in *Jackson* for determining whether a confession was voluntary are means to further the end that no utterance of a defendant not the product of his own free choice will be used against him. The Court today reaffirms what we held in *Jackson:* "[W]hen a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the confession was in fact voluntarily rendered." *Ante,* at 489. But the Court goes on to hold that it follows from *Jackson* that "the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary." *Ibid.* I disagree. In my view, the rationale of *Jackson* requires the conclusion that the preponderance standard does not provide sufficient protection against the danger that involuntary confessions will be employed in criminal trials.

A *Jackson* hearing normally presents the factfinder with conflicting testimony from the defendant and law enforcement officers about what occurred during the officers' interrogation of the defendant. The factfinder's resolution of this conflict is often, as a practical matter, the final resolution of the voluntariness issue. *Jackson, supra,* at 390–391. This case is a typical example. Petitioner testified that he confessed because the police had beaten him; the police testified that there was no beating. As the Court notes, "[t]he trial judge resolved this credibility problem in favor of the police and ruled the confession admissible." *Ante,* at 480. When the question before the factfinder is whether to believe one or the other of two self-serving accounts of what has happened, it is apparent that the standard of persuasion will in many instances be of controlling significance.

See *Speiser* v. *Randall*, 357 U. S. 513, 525–526 (1958). Although the Court suggests "that federal rights have [not] suffered from determining admissibility by a preponderance of the evidence" and that there has been no showing "that admissibility rulings have been unreliable . . . because not based on some higher standard," *ante*, at 488, I do not think it can be denied, given the factual nature of the ordinary voluntariness determination, that permitting a lower standard of proof will necessarily result in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard. The converse, of course, is also true. Requiring the higher standard means that some voluntary confessions will be excluded as involuntary even though they would have been found voluntary under the lower standard.

The standard of proof required for a criminal conviction presents a similar situation, yet we have held that guilt must be established by proof beyond a reasonable doubt. *In re Winship*, 397 U. S. 358, 361–364 (1970); see *id.*, at 370–372 (Harlan, J., concurring.) Permitting proof by a preponderance of the evidence would necessarily result in the conviction of more defendants who are in fact innocent. Conversely, imposing the burden of proof beyond a reasonable doubt means that more defendants who are in fact guilty are found innocent. It seems to me that the same considerations that demand the reasonable-doubt standard when guilt or innocence is at stake also demand that standard when the question is the admissibility of an allegedly involuntary confession.

We permit proof by a preponderance of the evidence in civil litigation because "we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *Id.*, at 371 (Harlan, J., concurring). We do not take that view in criminal cases.

We said in *Winship* that the reasonable-doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence . . . ." *Id.*, at 363. As Mr. Justice Harlan put it in his concurring opinion, the requirement of proof beyond a reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Id.*, at 372.

If we permit the prosecution to prove by a preponderance of the evidence that a confession was voluntary, then, to paraphrase Mr. Justice Harlan, we must be prepared to justify the view that it is no more serious in general to admit involuntary confessions than it is to exclude voluntary confessions. I am not prepared to justify that view. Compelled self-incrimination is so alien to the American sense of justice that I see no way that such a view could ever be justified. If we are to provide "concrete substance" for the command of the Fifth Amendment that no person shall be compelled to condemn himself, we must insist, as we do at the trial of guilt or innocence, that the prosecution prove that the defendant's confession was voluntary beyond a reasonable doubt.* In my judgment, to paraphrase Mr. Jus-

*My view that the reasonable-doubt standard must be imposed upon the prosecution does not depend upon whether that standard would be more effective than some lower standard in deterring police misconduct. When a defendant challenges his confession as involuntary, "the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary . . . .'" *Malloy* v. *Hogan*, 378 U. S. 1, 7 (1964). It is true that the defendant will frequently allege police misconduct, as petitioner did here. Nevertheless, as we said in *Townsend* v. *Sain*, 372 U. S. 293, 308 (1963), "[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible." (Emphasis in original.)

tice Harlan again, the command of the Fifth Amendment reflects the determination of our society that it is worse to permit involuntary self-condemnation than it is to deprive a jury of probative evidence. Just as we do not convict when there is a reasonable doubt of guilt, we should not permit the prosecution to introduce into evidence a defendant's confession when there is a reasonable doubt that it was the product of his free and rational choice.

I add only that the absolute bar against the admission of a defendant's compelled utterance at his criminal trial is fundamentally an expression of the American commitment to the moral worth of the individual. What we said in *Winship* bears repeating here. "[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*, at 364. I believe that it is just as critical to our system of criminal justice that when a person's words are used against him, no reasonable doubt remains that he spoke of his own free will.